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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 305

A. J. WHIPPLE, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 7, 1962
CERTIORARI GRANTED OCTOBER 22, 1962

SUPREME COURT OF THE UNITED STATES

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COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. A] [Caption omitted]

[fol. B] [File endorsement omitted]

Transcript of Record—Filed June 12, 1961

[fol. 1]

BEFORE THE

TAX COURT OF THE UNITED STATES

Docket No. 65603

A. J. WHIPPLE and MILDRED WHIPPLE,
Petitioners on Review,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

ORDER EXTENDING TIME—February 24, 1961

For cause, it is

Ordered: That the time for preparation of the evidence, transmission and delivery of the record on review in the United States Court of Appeals for the Fifth Circuit is extended to May 5, 1961.

J. E. Murdock, Judge.

[fol. 2]

BEFORE THE TAX COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—December 20, 1960

For cause, it is

Ordered: That the time for preparation of the evidence, transmission and delivery of the record on review in the United States Court of Appeals for the Fifth Circuit is extended to March 6, 1961.

J. E. Murdock, Judge.

[fol. 3]

BEFORE THE TAX COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—November 1, 1960

For cause, it is

Ordered: That the time for preparation of the evidence, transmission and delivery of the record on review in the United States Court of Appeals for the Fifth Circuit is extended to January 5, 1961.

J. E. Murdock, Judge.

BEFORE THE TAX COURT OF THE UNITED STATES

[Title omitted]

DOCKET ENTRIES

Appearances:

For Petitioners: Charles Dillingham, Esq., Ben H. Schleider, Jr., Esq.

For Respondent:

1957

Jan. 22—Petition received and filed. Taxpayer notified. Fee paid.

[fol. 4]

Jan. 28—Copy of petition served on General Counsel.

Jan. 22—Notice of appearance of Charles Dillingham as counsel filed. Served 1/28/57.

Jan. 22—Request for Circuit hearing in Houston, Texas filed by petrs. 1/25/57, granted. Served 1/28/57.

Mar. 11—Answer filed by resp. Served 3/13/57.

1959

Jan. 27—Notice of trial at Galveston, Texas. Apr. 20, 1959. Served 1/27/59.

Apr. 21, 22—Trial at Galveston by Judge Opper. Stip. of facts and exhibits filed. Appearance of Ben H. Schleider, Jr., Esq. Orig. briefs due July 21, 1959; replies due Sept. 4, 1959.

May 15—Transcript of proceedings of April 21, 22, 1959 filed.

July 20—Brief for petr. filed.)

July 21—Brief for resp. filed.) Served 7/22/59.

Sept. 3—Reply brief filed by petr. Served 9/17/59.

1960

Feb. 29—Memo. findings of fact and opinion filed. Judge Opper. Decision under R. 50. Served 3/1/60.

May 4—Rule 50 Computation filed by Respondent.

May 6—Notice of hearing June 8, 1960, Washington, D.C. on R. 50 Computation. (Resp.) Served 5/6/60.

June 8—Hearing at Washington, D.C. on Rule 50 Computation. Decision to entered in accordance to Resp. Comp.

June 9—Transcript of proceedings of June 8, 1960.

June 13—Decision entered, Judge Opper. Served 6/14/60.

Aug. 16—Order fixing bond at $28,000.00. Served 8/16/60.

Sept. 7—Surety bond in the amount of $28,000.00 approved and filed.

[fol. 5]

1960

Sept. 7—Petition for review by U. S. Ct. of Ap. 5th Cir. with assignments of error filed by petrs.

Sept. 7—Proof of service filed by petrs.

Oct. 10—Certified copy of order of U.S.C.A. 5th Cir. directing inclusion in the transcript of record in lieu of a narrative statement of the evidence of the original official report of proceedings before the Tax Court at Galveston, Texas, on 4/21/59 and 4/22/59, and the original stipulation of facts, with original exhibits 1-A thru 20-T, attached thereto, and the originals of petrs' exs. 21 thru 24. All said original exhibits to be transmitted to the appellate Court ten days prior to hearing, filed.

Nov. 1—Order extending time for preparation of the evidence, transmission and delivery of the record on rev. to Jan. 5, 1961. Served 11/1/60.

Dec. 20—Order extending time for preparation of the evidence, transmission and delivery of the record on rev. to Mar. 6, 1961. Served 12/21/60.

1961

Feb. 17—Praecipe for record with proof of service thereon filed by petrs.

Feb. 24—Order extending time for preparation of the evidence, transmission and delivery of the record on rev. to May 5, 1961. Served 2/24/61.

[fol. 6]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITION—Filed January 22, 1957

A. J. Whipple and Mildred Whipple, the above named Petitioners, hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency ARC:AP:DAL HOU:SED: 90D dated October 22, 1956, and as a basis of his proceedings alleges as follows:

I.

The Petitioners are individuals with their principal residence at 4015 Fernwood Street, Houston, Texas. A

joint return of husband and wife for the period here involved was filed with the Collector of Internal Revenue in Austin, Texas.

II.

The notice of deficiency (copy of which is attached and marked Exhibit "A") was mailed to Petitioners October 22, 1956.

III.

The deficiencies as determined by the Commissioner are in income taxes for the taxable year ended December 31, 1953, in an amount of $17,625.78, and penalties aggregating $2,379.83, and for the taxable year ending December 31, 1952, in an amount of $297.04.

[fol. 7] IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors

A. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing as a deduction dues expense in the amount of $347.00 on the basis that it was a personal expense, when actually these dues were incurred as business expenses.

B. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing as a deduction the commission expenses paid to D. M. Dozier and R. F. Jordan, and including them as costs of land, since these payments were made for personal services, and are therefore a proper deduction from Petitioners' ordinary income.

C. The Commissioner erred in assessing a deficiency against Petitioners for the Calendar year 1953 by disallowing the deduction of $56,975.10 bad debt of Mission Orange Bottling Company of Lubbock, Inc., from ordinary income as a business bad debt and classifying it as a capital loss, or in the alternative the deduction as an ordinary business loss of $33,577.33 of such $56,975.10 bad debt which had

been guaranteed by Petitioner, A. J. Whipple, personally, when Mission Orange Bottling Company of Lubbock, Inc., was solvent, and which Petitioner A. J. Whipple had been forced to pay under his guaranty when the corporation was hopelessly insolvent.

D. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallow-
[fol. 8] ing as a long term capital loss $2,500.00 as the cost of Texas International Manganese stock which became worthless in the year 1953.

E. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by assessing a penalty in the amount of $1,326.54 under Section 294(d)(1)(A) I.R.C.1939 representing maximum penalties for each quarter based on the actual tax which ultimately became due, although the actual amount of such tax could not be determined until after December 31, 1954, and was not required to be determined until March 15, 1954.

F. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by assessing a penalty in the amount of $804.00 under Section 294(d)(1)(B) representing maximum penalties for each quarter based on the actual tax which ultimately became due, although the actual amount of such tax could not be determined until after December 31, 1954, and was not required to be determined until March 15, 1954.

G. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1952 by assessing a penalty in the amount of $2,664.07 under Section 294(d)(1)(B) representing maximum penalties for each quarter based on the actual tax which ultimately became due, although the actual amount of such tax could be determined until after December 31, 1953, and was not required to be determined until March 15, 1953.

H. The Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1952 by assess-
[fol. 9] ing a penalty in the amount of $1,776.04 and under Section 294(d)(2). I.R.C. 1939 representing maximum pen-

alties for each quarter based on the actual tax which ultimately became due, although the amount of such tax could not be determined until after December 31, 1953, and was not required to be determined until March 15, 1953.

V.

The facts upon which Petitioners rely as a basis of this proceeding are as follows:

A. During the year 1953 and for several years prior thereto Petitioner A. J. Whipple was in the lumber, construction, restaurant, and bottling business and the dues which have been disallowed were paid in connection with organizations which the Petitioner had originally joined and continued as a member primarily for promotional and business purposes, and hence were proper miscellaneous business deductions.

B. The commissions paid to D. M. Dozier and R. F. Jordan were paid by Petitioner A. J. Whipple as compensation for their personal services and are therefore a proper deduction as such from Petitioners' ordinary income.

C. A. J. Whipple purchased the Mission Orange Bottling equipment and inventory of the Mission Orange Bottling plant in Lubbock, April 28, 1951, from D. C. Casey and assumed the lease to the premises at 2518 Avenue H, Lubbock, Texas. The franchise of Mission Orange Bottling Company was transferred to Petitioner A. J. Whipple individually and has been retained in his name individually to date. Mr. Whipple operated this plant for several [fol. 10] months as an individual, but in June, 1951, because of the fear of personal liability from products being sold and to allow a few friends and associates to invest in a part of the business, organized Mission Orange Bottling Company of Lubbock, Inc., for the purpose of limiting liability. Mr. Whipple himself later personally operated a machine vendor operation selling Mission Orange bottling products through vending machines as a joint venture on the side with two employees of the corporation.

During the first half of 1951, Mr. Whipple had liquidated his interest which he held in 13 corporations of which he

had been an organizer and 3 partnerships in the lumber, construction and real estate development fields, all of which had been highly successful. This liquidation had been the result of Mr. Whipple's severing his association in these former enterprises with Miles Strickland and John Anderson and his going into business for himself in a variety of enterprises consisting of a lumber company, an equipment company, four building and development companies, a restaurant, formation of a club corporation over the restaurant and bottling business in Lubbock. In the case of the lumber company, the restaurant, and the club, as well as the bottling plant, the premises are leased from Mr. Whipple. Mr. Whipple deliberately chose the restaurant and bottling businesses for the purpose of diversification. Throughout the five or six years which Mr. Whipple with Mr. Strickland, and sometimes Mr. Anderson, had been engaged in joint enterprises together, it had been their practice to form corporations with small capitalization and lend them money for operating capital until the corporations were able to accumulate enough in earnings to provide their own necessary operating capital. Then such sums previously ad- [fol. 11] vanced would be repaid from the corporation and used to finance additional enterprises. Virtually all the 13 corporations referred to above had been formed and financed this way and during 1951 and the next few years the corporations which he formed and controlled individually continued this practice.

Mission Orange Bottling Company of Lubbock, Inc., was capitalized and financed much along the same formula which Mr. Whipple had used in the numerous other enterprises in which he had had an interest. It was incorporated for $20,000 of stock issued to Mr. Whipple and certain associates, a portion of which was used in June, 1951, to purchase some of the physical assets of the business being operated by Mr. Whipple personally. The balance of the purchase of the equipment was set up on the corporation books as an account payable to Mr. Whipple. Credit from a Lubbock bank and from the suppliers of bottles, syrups and other materials necessary in the operation had been extended to Mr. Whipple personally. Although these obligations were assumed by the corporation

after it was formed, the bank, suppliers and other creditors required the personal indorsement and guarantee of Mr. Whipple in connection with almost all credit transactions of the corporation thereafter. It was expected that with this financial backing by Mr. Whipple personally the business would enjoy a substantial profit during the Summer months but the season proved to be something of a disappointment and it was decided that a new plant with expanded and up-to-date equipment would be necessary and desirable for the business. By this time the retail prices of soft drinks in many of the surrounding territories had been increased and it was expected that a price increase in the Lubbock area would be forthcoming shortly and thus raise [fol. 12] the profit margin of the business substantially. On the basis of these factors, Mr. Whipple personally constructed a large up-to-date modern plant and leased it to the corporation to operate.

Unfortunately, the new plant did not result in as much increased production as anticipated and the hoped for price increase did not occur. During the year 1953 the corporation lost more and more money and by December 1953 was completely insolvent without enough assets to pay off its obligations. By that time the corporation owed Mr. Whipple $120,447.86 and outside creditors approximately $80,000.00. About the only assets of the corporation which were worth anything were the plant equipment. Therefore, on December 15, 1953, Mr. Whipple entered into an agreement with the corporation under which he took the plant equipment and credited the corporation with its approximate book value of $70,000.00 at the same time he paid into the corporation $48,000, which was enough to pay off all other current obligations.

After the equipment had been taken out of the corporation on December 15, 1953, the corporation had virtually no assets out of which his balance of $56,975.10 could be paid, and this bad debt thereby became worthless. The only hope then of salvaging anything was to be able to sell the plant and equipment, which he has tried unsuccessfully since that time to do. When this bad debt became worthless, therefore, Mr. Whipple was the owner of the building and all of the physical equipment of the plant

and was actually managing the plant. Mr. Finley, a Vice President and Manager, had resigned during the Summer, leaving the plant with no manager. Actually, all important policy decisions and all details of finance and purchases had [fol. 13] been determined by Mr. Whipple throughout the whole period of the operation of the business in Lubbock as is best shown by the fact that during this two-year period Mr. Whipple made 273 long distance calls to Lubbock and 62 long distance calls were made from the plant to Mr. Whipple. Furthermore, Mr. Whipple had made 35 trips to Lubbock and the Manager and Plant Superintendent had made 14 trips to Houston, all in connection with the Lubbock Mission Orange operation.

From all of the foregoing facts it is respectfully submitted that Mr. Whipple was in the business of forming and financing corporations and was engaged in the business of acquiring, owning, financing, equipping and leasing a plant for the operation of the bottling business and was actually throughout this period engaged in the overall enterprise of owning and operating a bottling plant in Lubbock and that a business bad debt loss should be sustained.

In the alternative, but not by way of admission, even though the $56,975.10 bad debt was not a business bad debt, $33,577.33 should be allowed as an ordinary business loss by virtue of the following payments made in 1953 by Petitioner, A. J. Whipple, as personal guarantor of Mission Orange Bottling Company of Lubbock, Inc., indebtedness:

7/28/53	First National Bank in Lubbock	$ 1,005.14
8/ 4/53	Owens Illinois Glass	1,582.42
12/16/53	First National Bank in Lubbock	18,996.42
12/15/53	Parker Brown (oral)	2,421.40
12/15/53	Casey Delaney Insurance	820.38
12/15/53	Canada Dry	2,085.47
12/15/53	Knox Glass (He thinks)	600.00
[fol. 14]		
12/15/53	Federal Sign Co.	195.00
12/15/53	Owens Illinois Glass	2,931.48
12/15/53	Liberty Glass	2,939.62
		$33,577.33

When certain of the assets of the bottling business were transferred by Petitioner A. J. Whipple in June 1951 to Mission Orange Bottling Company, Inc., for part of the bottling enterprise to be conducted through the corporation, it was necessary in order to obtain adequate credit and operating capital to carry on the operations for A. J. Whipple personally to guarantee personally many of the accounts and obligations of the corporation. This situation continued throughout 1951 and 1952 and part of 1953, when it still appeared that the corporation was going to make money later. During 1953 the corporation began to be insolvent and it was unable to pay off its debts out of its own funds and A. J. Whipple was called upon by those creditors to whom he had made personal guarantees of the corporation's debts to pay off those accounts personally, as set forth above. It is respectfully submitted that under the circumstances Petitioners were entitled to deduct such sums totaling the $33,577.33 as an ordinary business loss.

D. The cost of Texas International Manganese stock was $2500.00, and the stock became completely worthless in the calendar year 1953.

E. During the year 1953 Petitioner, A. J. Whipple, was engaged in the building, bottling and restaurant business, all of which were very speculative, and the extent of his income and losses in such business was impossible to estimate or determine until after December [fol. 15] 31, 1953, and not until complicated accounting work was done, which was not finished until February or early March 1954.

F. During the year 1953 Petitioner, A. J. Whipple, was engaged in the building, bottling and restaurant business, all of which were very speculative, and the extent of his income and losses in such business was impossible to estimate or determine until after December 31, 1953, and not until complicated accounting work was done, which was not finished until February or early March 1954.

G. During the year 1952 Petitioner, A. J. Whipple, was engaged in the building, bottling and restaurant business, all of which were very speculative, and the extent of his income and losses in such business was impossible to estimate or determine until after December 31, 1952, and not until complicated accounting work was done, which was not finished until February or early March, 1953.

H. During the year 1952 Petitioner, A. J. Whipple, was engaged in the building, bottling and restaurant business, all of which were very speculative, and the extent of his income and losses in such business was impossible to estimate or determine until after December 31, 1952, and not until complicated accounting work was done, which was not finished until February or early March, 1953.

Wherefore, Petitioners pray that this Court hear the proceeding and then:

A. Determine that the Commissioner erred in assessing a deficiency against Petitioners for the calendar year [fol. 16] 1953 by disallowing as a deduction dues expense in the amount of $347.00; and

B. Determine that the Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing as a deduction the expenses paid to D. M. Dozier and R. F. Jordan as commissions; and

C. (1) Determine that the Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing the deduction of $56,975.10 as a business bad debt loss of amounts owed Petitioners by Mission Orange Bottling Company of Lubbock, Inc.; or

(2) In the alternative that the Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing the deduction as an ordinary business loss of $33,577.33 of the Mission Orange Bottling Company of Lubbock, Inc.'s $56,975.10 bad debt; and

D. Determine that the Commissioner erred in assessing a deficiency against Petitioners for the calendar year 1953 by disallowing as a long term capital loss $2500.00

as the cost of Texas International Manganese stock, which became worthless in the year 1953.

E. Determine that the Commissioner has erred in assessing a penalty against Petitioners for the calendar year 1953 under Section 294(d)(1)(A) I.R.C. 1939 in the amount of $1,326.54.

F. Determine that the Commissioner has erred in assessing a penalty against Petitioners for the calendar year 1953 [fol. 17] under Section 294(d)(1)(B) in the amount of $804.00.

G. Determine that the Commissioner has erred in assessing a penalty against Petitioners for the calendar year 1952 under Section 294(d)(2) I.R.C. 1939 in the amount of $2,664.07.

H. Determine that the Commissioner has erred in assessing a penalty against Petitioners for the calendar year 1952 under Section 294(d)(2) I.R.C. 1939 in the amount of $1776.04.

A. J. Whipple, Mildred Whipple.

Duly sworn to by A. J. Whipple, jurat omitted in printing.

[fol. 18] *Duly sworn to by Mildred Whipple, jurat omitted in printing.*

Dillingham & Schleider, Charles Dillingham, Attorneys for Petitioners.

802 Texas National Bank Bldg., Houston 2, Texas.

[fol. 19]

EXHIBIT "A" TO PETITION

Appellate Division
316 Federal Land Bank Building
430 Lamar Avenue
Houston 2, Texas
Oct. 22, 1956

Registered

ARC:AP:DAL
HOU:SED:90D

Mr. A. J. Whipple and
Mrs. Mildred Whipple
Husband and Wife
4015 Fernwood Drive
Houston, Texas

Dear Mr. and Mrs. Whipple:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1952 and December 31, 1953, discloses deficiencies in tax aggregating $17,922.82 and penalties aggregating $6,818.94, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D.C., for a redetermination of the deficiency or deficiencies. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Satur-
[fol. 20] days, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to

the Associate Chief, Appellate Division, 316 Federal Land Bank Building, 430 Lamar Avenue, Houston 2, Texas. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earliest.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner
By (Signed) ROLAND K. JONES, RWC
Associate Chief, Appellate Division.

Enclosures:

Statement.
Form 1276.

[fol. 21]

ATTACHMENT TO EXHIBIT "A"

Statement.

ARC:AP:DAL
HOU:SED:90D

Mr. A. J. Whipple and Mrs. Mildred Whipple Husband and Wife
4015 Fernwood Drive
Houston, Texas

Summary of Income Tax Liability.

Year	Deficiency	Penalties Internal Revenue Code (1939) Sec. 294 (d)(1)(A)	Sec. 294 (d)(1)(B)	Sec. 294 (d)(2)
1952	$ 297.04	$2,664.07	$ —	$1,776.04
1953	17,625.78	1,326.54	804.00	248.29
Totals	$17,922.82	$3,990.61	$804.00	$2,024.33

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated June 1, 1955; to your protest dated October 15, 1955; and to the statements made at the conferences held on February 9, 1956 and May 18, 1956.

Since you did not file timely declarations of estimated tax for the years 1952 and 1953 the penalty provided in section 294(d)(1)(A) of the Internal Revenue Code of 1939 is being asserted to such years as reflected herein.

Inasmuch as 80 percent of your final tax for each of the taxable years 1952 and 1953 is in excess of any estimated tax declared for such years the penalty provided in sec- [fol. 22] tion 294(d)(2) of the Internal Revenue Code of 1939 is being asserted to such years as reflected herein.

A penalty in the amount of $804.00 has been imposed as to the year 1953 under the provisions of section 294 (d)(1)(B) of the Internal Revenue Code of 1939 inasmuch as you failed to pay an installment of the estimated tax declared by you for such year within the time prescribed.

A copy of this letter and statement has been mailed to your representative, Mr. Charles Diflingham, 802 Texas National Bank Building, Houston 2, Texas, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Taxable year ended Dec. 31, 1952.

Scnedule 1.

Adjustments to Net Income.

Net income shown on joint return		$67,694.28
Additional income and unallowable deductions:		
(a) Interest income	$ 22.00	
(b) Miscellaneous expense	67.80	
(c) Dues expense	347.00	
Total	$436.80	
Net income as adjusted		$68,131.08

Schedule 1-A.

Explanation of Adjustments.

(a) The deduction for interest in the amount of $22.00 shown in your return as accrued and unpaid is disallowed [fol. 23] since it was not treated as an accrual of the taxable year.

(b) Under miscellaneous expense you claimed a deduction for a penalty paid in connection with unemployment taxes in the amount of $67.80. This deduction is disallowed since penalties are not considered ordinary and necessary business expense.

(c) Dues expense

7-28-52 YMCA Membership	$100.00
8-31-52 Houston Turnverien	36.00
9- 9-52 Golferest Country Club	24.00
10- 8-52 Golferest Country Club	24.00
11-10-52 Golferest Country Club	24.00
11-10-52 Wm. Pierson	12.00
12- 9-52 Golferest Country Club	27.00
7-25-52 Sam Alexander	100.00
Total	$347.00

It has been determined that the above-listed amounts of dues, membership, and miscellaneous items constitute personal expenses and they are accordingly disallowed as deductible business expenses.

Schedule 2.

Computation of Tax.

Net income as adjusted	$68,131.08
Exemptions	2,400.00
Income subject to tax	$65,731.08
One-half of such income	32,865.54
Tax on $32,865.54	$16,604.57

[fol. 24] Multiply by 2 for tax liability $33,209.14
Liability shown on return, Acct. No. AP. 700400 .. 32,912.10

Deficiency ..... $ 297.04

Penalty for failure to file declaration of estimated tax on time:

Liability $33,209.14
Amount withheld on wages 3,608.40

Balance to be divided into 4 installments $29,600.74

Due Date	Amount due	Amount paid	Not timely paid	Months unpaid	Percentage	Penalty
3/15/52	$7,400.10	$None	$7,400.19	12	10%	$ 740.02
6/15/52	7,400.19	None	7,400.19	9	10%	740.02
9/15/52	7,400.18	None	7,400.18	6	10%	740.02
1/15/53	7,400.18	None	7,400.18	2	6%	444.01

Penalty, Section 294 (d)(1)(A), I.R.C. 1939 $2,664.07

Penalty for substantial underestimate:

Liability $33,209.14
Amount withheld on wages 3,608.40

Underestimate $29,600.74
Penalty, Sec. 294(d)(2), I.R.C. 1939, 6% of $29,600.74 ..... $ 1,776.04

Taxable year ended December 31, 1953.

Schedule 3.

Adjustments to Net Income

Net income shown on joint return $12,805.50

[fol. 25] Additional income and unallowable deductions:

(a) Worthless lease loss	63.39
(b) Dues expense	145.00
(c) Commissions expense	5,349.50
(d) Bad debt	56,975.10
Total	$62,532.99

Nontaxable income and additional deductions:		
(e) Long-term capital gain	$25,690.99	
(f) Short-term capital loss	1,000.00	
Total	$26,690.99	
Net addition		35,842.00
Net income as adjusted		$48,647.50

Taxable year ended December 31, 1953.

Schedule 3-A.

Explanation of Adjustments.

(a) You claimed a deduction in the amount of $250.00 on account of a worthless oil lease. Of the total claimed the sum of $186.61 was substantiated leaving a balance of $63.39 which is disallowed.

(b) The explanation for this adjustment is the same as that shown in schedule 1-A (c).

The items disallowed are:

1-22-53	Golferest Country Club	$ 24.00
2-12-53	Golferest Country Club	24.00
2- 6-53	Houston Turnverien	36.00
5-14-53	Arabia Temple Drum Corps	25.00
11-14-53	Scottish Rite	12.00
11-14-53	Golferest Country Club	24.00
	Total	$145.00

[fol. 26] (c) Commission expense claimed in your return for the taxable year in the amount of $5,349.50 is disallowed as an ordinary and necessary business expense. It has been determined that such amount, consisting of a payment of $2,000.00 to R. F. Jordan and $3,349.50 to D. M. Dozier, constitutes part of the cost of acquiring land. Inasmuch as this land was acquired in 1952 and sold during 1953 the said amount of $5,349.50 has been added to the basis of such property in computing the long-term capital gain from its sale elsewhere in this statement.

(d) In your return for the taxable year you claimed a deduction for a business bad debt in the amount of $56,975.10, representing an amount claimed to be due you from Mission Orange Bottling Company of Lubbock, Inc., Lubbock, Texas. It has been determined that such amount constitutes a non-business bad debt within the concept of section 23(k)(4) of the Internal Revenue Code of 1939. As such it has been disallowed as an ordinary business bad debt deduction and has been treated elsewhere in this statement as a short-term capital loss.

(e) The long-term capital gain of $25,690.99 reported by you is eliminated and the capital gains and losses are recomputed as follows:

Short-term capital loss (non-business bad debt)			$56,975.10
Long-term capital gain, per return, 100%		$51,381.99	
Add: Loss based upon the worthlessness of Texas Manganese Steel Stock disallowed	$2,500.00		
[fol. 27] Deduct: Commission expense allowed as additional cost of property sold	5,349.50	2,849.50	
Long-term capital gain as adjusted		$48,532.49	
Less: Long-term capital loss, stock of Mission Orange Bottling Co.		31,800.00	
Net long-term capital gain			16,732.49
Net short-term capital loss (brought forward)			$40,242.61
Less: Amount allowed, 1953			1,000.00
Capital loss carry-over			$39,242.61

In computing net long-term capital gain in the foregoing schedule no loss has been allowed to you arising from worthlessness of the stock Texas International Manganese Company. It has been determined that no such loss is allowable inasmuch as you have failed to substantiate any cost basis in such stock or the fact of its becoming worthless during the taxable year.

(f) You are allowed the maximum capital loss deduction in the taxable year.

Schedule 4.

Computation of Tax.

Net income as adjusted	$48,647.50
Exemptions	2,400.00
[fol. 28] Income subject to tax	$46,247.50
One-half of such income	$23,123.75
Tax on $23,123.75	$10,097.68
Multiply by 2 for tax liability	$20,195.36
Liability shown on return, Acct. No. BC 1001383	2,569.58
Deficiency	$17,625.78

Penalty for failure to file declaration of estimated tax on time:

Liability	$20,195.36
Amount withheld on wages	2,508.00
Balance to be divided into 4 installments	$17,687.36

Due Date	Amount due	Amount paid	Not timely paid	Months unpaid	Percentage	Penalty
3/15/53	$4,421.84	$None	$4,421.84	12	10%	$ 442.18
6/15/53	4,421.84	None	4,421.84	9	10%	442.18
5/15/53	4,421.84	None	4,421.84	6	10%	442.18
1/15/54	—	—	—	—	—	—

Penalty, Section 294(d)(1)(A), I.R.C. 1939	$1,326.54

Penalty for failure to pay installments on estimated tax:

*Estimated tax shown on Form 1040-ES $13,400

Due Date	Amount due	Amount paid	Not timely paid	Months unpaid	Percentage	Penalty
3/15/53	—	—	—	—	—	—
6/15/53	—	—	—	—	—	—
9/15/53	—	—	—	—	—	—
1/15/54	$13,400.00	$None	$13,400.00	2	6%	$804.00

Penalty, Section 294(d)(1)(B), I.R.C. 1939 $804.00

[fol. 29] Penalty for substantial underestimate of estimated tax, Section 294(d)(2), Internal Revenue Code 1939:

Liability		$20,195.36
80% of above amount		$16,156.29
Less: Amount withheld on wages	$ 2,508.00	
Estimated tax	13,400.00	15,908.00
(a) Tentative addition to tax		$ 248.29
Liability		$20,195.36
Less: Amount withheld on wages	$ 2,508.00	
Estimated tax	13,400.00	15,908.00
Difference		$ 4,287.36
(b) Tentative addition to tax, 6% of $4,287.36		$ 257.24

Penalty
Item (a) or (b), whichever is lesser $ 248.29

* Declaration of estimated tax filed January 15, 1954.

BEFORE THE TAX COURT OF THE UNITED STATES

ANSWER—Filed March 11, 1957

The Respondent, in answer to the petition filed in this case admits and denies as follows:

I., II.

Admits the allegations of paragraphs I and II of the petition.

[fol. 30]

III.

Admits that the deficiencies as determined by the Commissioner are in income taxes for the taxable year ended December 31, 1953, in an amount of $17,625.78, and penalties aggregating $2,378.83, and that there were deficiencies and penalties determined for the taxable year ending December 31, 1952; but denies the remaining allegations of paragraph III of the petition.

IV.

A. through H. Denies that the respondent erred in the manner alleged in paragraphs IV.A through IV.H, inclusive of the petition.

V.

A. and B. Denies the allegations of paragraphs V.A and V.B of the petition.

C. and D. Denies the allegations of paragraphs V.C and V.D of the petition for want of information sufficient to form a belief.

E. through H. Denies the allegations of paragraphs V.E through V.H, inclusive, of the petition.

VI.

Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

[fol. 31] Wherefore, it is prayed that the deficiencies determined by the respondent be in all respects approved.

Herman T. Reiling, FSG, Acting Chief Counsel, Internal Revenue Service.

Of Counsel: J. Marvin Kelley, Regional Counsel, Robert L. Liken, Attorney, Internal Revenue Service, 201 Federal Land Bank Building, Houston 2, Texas.

RLL/mfn
2/28/57

BEFORE THE TAX COURT OF THE UNITED STATES

MEMORANDUM FINDINGS OF FACT AND OPINION
—Filed February 29, 1960

T. C. Memo. 1960-36

[Title omitted]

Opper, Judge: Respondent determined deficiencies in petitioners' income tax and in additions to tax for the years 1952 and 1953 as follows:

[fol. 32]

Year	Income Tax	Sec. 294[1] (d)(1)(A)	Sec. 294 (d)(1)(B)	Sec. 294 (d)(2)
1952	$ 297.04	$2,664.07	—0—	$1,776.04
1953	17,625.78	1,326.54	$804.00	248.29

The issues to be decided are (1) whether a $56,975.10 debt owed to petitioners in 1953 which became uncollectible in that year was a business or nonbusiness bad debt within the meaning of section 23 (k), and (2) whether $3,349.50, paid by petitioners in 1953 to D. M. Dozier, is a deductible business expense or a capital expenditure. Petitioners abandoned, on brief, all alleged errors in regard to the imposition of additions to tax under section 294(d), except as to the correct amount of additions to tax due for 1953

[1] All section references are to the Internal Revenue Code of 1939.

under section 294 (d)(1)(A) which may be resolved in accordance with Rule 50 after we dispose of the major issues presented for our decision. Other issues raised by the pleadings have either been conceded or resolved by stipulation.

Findings of Fact

The stipulated facts are found.

A. J. Whipple, hereafter called petitioner, and Mildred Whipple are husband and wife and reside in Houston, Texas. They filed their joint income tax returns for 1952 and 1953 with the district director of internal revenue at Austin, Texas.

Petitioner, prior to 1941, was a construction superintendent and an estimator for a lumber company. In 1941, and for about a year thereafter, he and W. E. Brown were partners in the construction of houses and homes.

[fol. 33] Around 1942 petitioner, Miles Strickland and W. C. Perkins formed the S.W.P. Construction Company, a partnership organized to build houses. Perkins later withdrew from this venture and the partnership became known as S. & W. Construction Company. At some time subsequent to 1942, petitioner and Strickland formed the following partnerships: Evergreen-Rice Company, a construction company; Airline Lumber and Supply Company, Ltd., of which John W. Anderson was also a partner; Shakertown Distributors, formed, with Anderson, to distribute shingles; Gulf Coast Plumbing and Supply Company; and State Tile Distributors, a wholesale tile company which resulted from petitioner's informal negotiations to purchase 4 carloads of tile.

During the years 1949 and 1950, petitioner was an original incorporator of 7 corporations, as follows: Federal Road Building Corporation; Richmond Plaza, Inc.; Strickland-Whipple Construction Company, Inc., a successor to the partnership S. & W. Construction Company; Airline Lumber and Supply Company, Inc., a successor to the partnership, Airline Lumber and Supply Company, Ltd.; Dorwayne Construction Corporation; 29th and Airline, Inc., a real estate rental corporation which owned and rented the property occupied by Airline Lumber and Sup-

ply Company, Inc., and Shakertown Distributors; and Federal Road Lumber Company, Inc.

In 1951 petitioner sold his interest in the 7 above-named corporations and in Shakertown Distributors to Miles Strickland. During the same year he sold to Strickland his equity in 5 other corporations. In his 1951 income tax return, petitioner reported this sale as relating to property he acquired in 1949. These 5 corporations, namely, Industrial Homes, Inc., Harbor Homes, Inc., Commonwealth and California Corporation, Commonwealth and [fol. 34] Missouri Corporation, and Riverside Apartments Corporation, were in the rental housing or construction business. All of these sales resulted in gain to petitioner which he reported on his 1951 return as long-term capital gain.

In 1951 petitioner purchased the land and improvements located at 2436 Bissonnet Street, Houston, Texas, as the location for various construction businesses and other enterprises. He formed the A. J. Whipple Construction Company, which was a partnership of petitioner, V. L. Yarborough, Leonard Olive and G. A. Durham. This partnership was later succeeded by another partnership, A. J. Whipple Construction Co. No. 2.

During the years 1951 and 1952, petitioner was an original incorporator of 8 corporations, as follows: Whipple Lumber Company; Whipple Equipment Co., Inc., which engaged in the business of renting automobiles, trucks and construction equipment; Dozier-Whipple Construction Corporation; Chevy Chase Development Corporation; Whipple Construction Co., Inc.; Angelton Homes Corporation; Angelton Building & Holding Corp.; and Mission Orange Bottling Co. of Lubbock, Inc., hereafter called Mission Orange. During 1952 and 1953, petitioner received salaries totaling $29,400 and $33,450, respectively, from some of the construction corporations.

Petitioner acquired land in Pasadena, Angelton, Bellaire and Houston, Texas, and engaged in sales activities with respect to such lands during 1951 through 1953. He purchased a restaurant in Houston and sold it to Guy Francis on June 1, 1953. At some time he engaged in several oil ventures.

[fol. 35] On April 17, 1951, petitioner acquired an option to purchase the Mission Orange Bottling Co., a sole proprietorship owned by D. C. Casey. On April 21, 1951, petitioner, as lessee, rented the premises occupied by Casey's business for 20 months, effective May 1, 1951, for $150 per month. On April 25, 1951, petitioner obtained a franchise from the Mission Dry Corporation entitling him to produce, bottle, distribute, and sell Mission beverages in certain counties in Texas. On April 27, 1951, petitioner purchased the bottling machinery and equipment from Casey for $46,225. He conducted this business as a sole proprietorship under the name Mission Orange Bottling Co. until approximately July 1, 1951, when he sold the bottling machinery and equipment to Mission Orange. He did not transfer the franchise to Mission Orange.

Mission Orange was organized under the laws of Texas on June 8, 1951, with an authorized capital stock of $20,000, of which amount $10,000 or 100 shares, par value of $100 each, were subscribed to and paid for by the following persons:

Shareholder	Office Held	Shares	Par Value
Petitioner	President	88	$ 8,800
James A. Finley	Vice President	10	1,000
Charles Dillingham	Secretary	2	200
Total		100	$10,000

[fol. 36] The charter of Mission Orange was amended on December 8, 1952 to increase the authorized capital stock to $40,000. Thereafter the issued and outstanding stock was held as follows:

Shareholder	Shares	Per cent	Par Value
Petitioner	308	77.	$30,800
James A. Finley	10	2.5	1,000
Charles Dillingham	2	.5	200
Cecil Clark	20	5.	2,000
Dora B. Ellzey	10	2.5	1,000
D. M. Dozier	10	2.5	1,000
Jack Knostman	20	5.	2,000
James F. Webster	20	5.	2,000
Total	400	100.	$40,000

Sometime prior to the end of 1953, petitioner increased his holding to 318 shares, which was 79.5 per cent of those outstanding and represented an investment of $31,800.

In 1952 petitioner erected a bottling plant on land which he purchased in Lubbock, Texas. The land and building cost a total of $43,601.70. On July 14, 1952, petitioner leased this plant to Mission Orange for a 10-year term, beginning August 1, 1952, with an option to renew. The prescribed rental was $500 per month for the first 3 years and $500 per month plus 1 per cent of gross sales thereafter. In his 1952 and 1953 return, petitioner claimed a deduction for depreciation of the bottling plant in Lubbock. These returns reflect that petitioner received no rent during either year for that building.

Petitioner, directly or indirectly, made cash advances to Mission Orange of $48,550 in 1952 and $6,750 in 1953. [fol. 37] He paid Mission Orange's expenses amounting to $2,975.76 during the years 1951 through 1953 and received refunds and credits totaling $4,388.50. The balance due to petitioner by Mission Orange on December 1, 1953, including the amount of $25,502.50 owed him as the result of his sale of the bottling assets to the corporation in July 1951, was $79,489.76.

On December 15, 1953, petitioner advanced Mission Orange $48,000 to pay general creditors and on the same date received a transfer from Mission Orange of bottling machinery, equipment and an automobile which had a total book value of $70,414.66. The net amount due by Mission Orange to petitioner on December 31, 1953 was $56,975.10. This debt became worthless in 1953.

On September 1, 1951, petitioner acquired stock of a corporation known as Mason Root Beer. This corporation owned a franchise to bottle and sell Mason root beer in Amarillo, Texas. The root beer was bottled at the Mission Orange plant in Lubbock. Mason Root Beer failed in 1953 and petitioner's return for that year reflects a $3,300 loss on his stock in that corporation and a nonbusiness bad debt due from that corporation of $53.33.

Petitioner had a vending machine arangement with Ideal, Indiana, which sold vending machines to the trade. Mission Orange had no interest in this venture.

Petitioner made loans to his various corporations, partnerships, fellow shareholders and partners throughout the years in issue. His income tax returns for 1951, 1952 and 1953 reflect interest income as follows:

[fol. 38]

Payor	1951	1952	1953
Whipple Lumber Co., Inc.	$ 19.35	$ 868.51	$1,047.38
Dozier-Whipple Construction Corp.	61.42	393.89	—
Whipple Construction Co., Inc.	130.68	5.61	—
Angleton Homes Corp.	391.98	—	—
A. J. Whipple Construction Co.	4.92	44.28	—
Cecil Clark	70.56	45.61	—
D. M. Dozier	70.56	45.61	—
G. A. Durham	86.98	74.33	—
J. A. Finley	64.46	—	—
Whipple Equipment Co., Inc.	591.89	575.51	37.82
Willard Evans	70.56	45.61	—
Dora Ellzey	70.56	45.61	—
L. R. Olive	24.99	4.76	—
Durham-Clark Building Supply Co.	9.24	57.95	—
W. N. Atkins	20.81	*(20.81)	—
Roy J. Pate	1.19	*(1.19)	—
Harland Miller	—	47.00	—
The Brag Club, Inc.	—	53.07	19.16
Guy Francis — Guy's Restaurant	—	—	643.23
Total Interest Income	**$1,680.15	$2,285.35	$1,747.59

* Interest accrued and unpaid in 1951.

** The correct total is $1,690.15.

[fol. 39] Petitioner deducted the debt due from Mission Orange on his 1953 return as a business bad debt. Petitioner was not in the business of organizing, promoting, managing or financing corporations in 1953. He was not in the business of lending money in that year.

In his return for 1953, petitioner deducted $3,349.50 as "commissions" paid to D. M. Dozier. Respondent determined that this payment "constitutes part of the cost of acquiring land * * * in 1952 and sold during 1953 * * *." $3,349.50 was entered on petitioner's records as a part of the costs of the purchase of the Westheimer tract, which petitioner purchased on April 3, 1952 for $583,181.47, and sold in 1953 for $672,282.00. At some later time, $3,349.50 was credited on petitioner's records to the Westheimer tract and charged as a direct expense. Petitioner hired Dozier in 1951, agreeing to pay him a salary, expenses and 15 per cent of profits of all joint ventures, partnerships and individual land deals in which petitioner had an interest, except Whipple Lumber Company. Dozier left petitioner's employ in February 1953 before the sale of the Westheimer tract and was paid approximately $29,000 for his share of profits, both realized and anticipated. The $3,349.50 in dispute was included in the foregoing payment. That amount is 15 per cent of the profits anticipated to be realized from the sale of the Westheimer tract.

Petitioner failed to file a declaration of estimated tax for 1952. It is stipulated that he filed such a declaration for 1953 on January 14, 1954.

[fol. 40]

OPINION

The primary issue here is one that is frequently before this Court. Petitioner, through guarantees or outright loans, advanced substantial sums to a corporation which he controlled. Later developments proved his investment unfortunate and he is here claiming that his uncollectible advances arose out of his trade or business and that he should be permitted to deduct them in full and without regard to the limitations imposed on nonbusiness bad debts by section 23 (k) (4).

Petitioner would have us find a proximate relationship between the loss occasioned by the worthlessness of the debt due from Mission Orange and any one of three businesses in which he alleges he was individually engaged at the time of the loss. He contends that he was in the busi-

ness of organizing, promoting, managing and financing corporations, general financing and lending of money, operating a bottling business, or all three,

Looking first to petitioner's alleged promotional activities, it is apparent that he was instrumental in incorporating 15 corporations over a period of less than 4 years, commencing in 1949. Fourteen of these corporations were engaged in the construction, building or real estate business. Petitioner owned stock in 5 additional construction or real estate corporations and at one time or another was a member of 10 partnerships involved in similar activities. Individually, petitioner was in the construction or real estate business.

What petitioner fails to recognize is the distinction between carrying on one's business through a corporate form, which, of course, requires some organizing and financing, [fol. 41] and the business of dealing in corporations, which may likewise require some financing arrangements. [Holtz v. Commissioner, (C.A. 9) 256 F. 2d 865, 870; affirming T.C. Memo. 1957-106.]

His purpose in forming the 14 corporations was to facilitate his construction or real estate business and not to develop them for sale as going businesses to customers in the course of the business of promoting. H. Beale Rollins, 32 T.C. 604, 615. Petitioner apparently entertained that opinion himself in the year 1951 when in his return for that year he reported the sale of 12 corporations and 1 partnership as the sale of capital assets. See Thomas Reed Vreeland, 31 T.C. 78. The evidence does not show that petitioner's business in 1953 was any different from 1951.

Petitioner invites our attention to his 1951, 1952 and 1953 returns to substantiate his claim that he was in the business of lending money. In 1951 he reported the receipt of $1,680.15 as interest from 16 corporations, partnerships or individuals; $1,200.24 of this sum was interest received from his construction corporations or partnerships. In 1952 he reported the receipt of $2,307.35 as interest from 14 corporations, partnerships or individuals; $1,887.80 of this sum was interest received from his construction corporations or partnerships. In 1953, $1,747.59 was reported as interest received from 4 corporations or individuals and

$1,085.20 of this amount was received from 2 of his construction corporations. Some of the other amounts were trivial, such as $9.24 and $1.19 received from Durham-Clark Building Supply Company and Roy J. Pate, respectively, in 1951, and $4.76 received from L. R. Olive in 1952. It therefore appears that the bulk of petitioner's loans went to corporations and partnerships in which he [fol. 42] had an investment and we cannot find that the purpose of these loans was other than to protect that investment. Such lending activity does not constitute a trade or business. Holtz v. Commissioner, supra.

The remaining loans reflected by petitioner's interest receipts were, to a large extent, made to fellow shareholders and partners. We cannot find that lending activity of this nature constitutes trade or business. However, even if we were to find otherwise, there is no evidence that the advances made to Mission Orange were made as a part of that business. Petitioner received intermittent payments from Mission Orange, admittedly small in amount, but he reflected no amount as having been received as interest and there is no evidence that that corporation agreed or was obligated to pay interest. Without interest petitioner stood to make no profit on the loan, and if there is no prospect of profit there is no trade or business. Thacher v. Lowe, (S.D.N.Y.) 288 F. 994.

Petitioner's contention that he was in the bottling business when the debt in question became worthless is without evidentiary support for two reasons. First, petitioner would have us find that he was in the bottling business from December 15 through December 31, 1953 because he was "the dominant stockholder of Masons Root Beer, a participant in soft drink vending machine business, the President of Mission Orange Bottling Co., Inc., the holder of 79% of its stock, the owner of the building in which the bottling plant was located, the holder of the bottling franchise, the owner of the bottling machinery and equipment, [and] the plant manager." Petitioner's relation to Mason Root Beer and Mission Orange as a shareholder, [fol. 43] officer or employee does not place him in the business in which the corporations were engaged. Burnet v. Clark, 287 U.S. 410. Although it appears that petitioner

had sufficient assets subsequent to December 15, 1953 to engage individually in the bottling business, there is no evidence that he did so, and the mere ownership of these assets does not put him in the bottling business.

The second fault we find with petitioner's contention is that the stipulated date of worthlessness of the debt is the year 1953 and there is nothing in the record which might support petitioner's allegation of a more specific date, that is December 31, 1953. If we were required to find a definite time of worthlessness, we should be inclined to select December 15, 1953, at which time petitioner received the bottling assets from Mission Orange in partial satisfaction of that corporation's obligation. At this point petitioner was not in the bottling business. It may be, moreover, that any debt arising at that time was worthless when acquired.

Even if we assume that the debt became worthless subsequent to December 15 and at a time when petitioner was in the bottling business, petitioner must still show us the proximate relationship between his business and the bad debt loss. Jan G. J. Boissevain, 17 T.C. 325. We have been unable to ascertain any proximate relationship between the debt owed by Mission Orange, a corporation no longer in the bottling business, and petitioner's alleged business of bottling soft drinks, and petitioner has pointed out none. A more realistic description of that payment might be an exchange or purchase of corporate assets.

The bad debt losses in question were not incurred in any trade or business conducted by petitioner. They are nonbusiness bad debts and accordingly are to be treated as [fol. 44] short-term capital losses. Section 23 (k) (4).

The evidence submitted in regard to the second issue is vague and indefinite. Petitioner contends that he paid D. M. Dozier $3,349.50 under a contract of employment. The amount in controversy is claimed to have been but a part of a larger sum paid by check to Dozier. Although the testimony is slight, there is no contrary evidence, and on the strength of petitioner's statements under oath, we accept his version that the payments were ordinary and necessary as compensation for contributing services and not a part of a commission on the purchase of specific property.

The final issue concerns additions to tax relating to declarations of estimated tax. The briefs in this case were filed before the Supreme Court handed down its decision in Commissioner v. Acker, 361 U.S. 87. It was held in that case that the additions to tax under section 294 (d) (2) are not to be applied when no declaration of estimated tax has been filed. Respondent's determination of additions to tax under section 294 (d) (2) for 1952 are accordingly disallowed. For 1953 petitioner did file a declaration of estimated tax, although not until January 14, 1954. Respondent determined that this declaration was untimely and petitioner has offered nothing to indicate the contrary. Nor has petitioner shown that his failure to file a timely declaration was due to reasonable cause and not to willful neglect. The addition to tax determined for 1953 under section 294 (d) (1) (A) is therefore upheld. A declaration having been filed for 1953, Commissioner v. Acker, supra, has no application to the addition to tax determined under section 294 (d) (2) for that year, and this determination is also upheld. Rose S. Harkins, 33 T.C. —— (Nov. 30, 1959). Section 294 (d) [fol. 45] (1) (B) imposes an addition to tax for failure to pay installments of estimated tax when either a timely declaration was filed or a declaration was late due to reasonable cause and not to willful neglect. Respondent may not impose additions to tax under both section 294 (d) (1) (A) and section 294 (d) (1) (B). Regs. 118, sec. 39.294-1 (b) (2). The addition to tax determined for 1953 under section 294 (d) (1) (B) is accordingly disallowed.

Decision will be entered under Rule 50.

BEFORE THE TAX COURT OF THE UNITED STATES

DECISION—June 13, 1960

Respondent having on May 4, 1960 filed a recomputation of tax for entry of decision in accordance with Memorandum Findings of Fact and Opinion herein, filed February 29, 1960, and this proceeding having been called from the Washington, D. C. calendar on June 8, 1960, and peti-

tioners not having appeared in opposition to respondent's computation, now, therefore, it is

Ordered and Decided: That there are deficiencies in income tax and additions to tax as follows:

		Additions to tax—I.R.C. 1939		
Year	Deficiency	Sec. 294 (d)(1)(A)	Sec. 294 (d)(1)(B)	Sec. 294(d)(2)
1952	$ 297.04	$2,664.07		None
1953	15,459.18	1,164.06	None	None

Clarence V. Opper, Judge.

Enter:

Entered Jun. 13, 1960.

Served Jun. 14, 1960.

[fol. 46]

BEFORE THE TAX COURT OF THE UNITED STATES

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—
Filed September 7, 1960.

To the Honorable Judges of the United States Court of Appeals, Fifth Circuit:

Now come A. J. Whipple and Mildred Whipple, petitioners, and respectfully show:

Jurisdiction.

Petitioners, A. J. Whipple and Mildred Whipple, were during the calendar years 1952 and 1953, being the tax years involved in this petition, bona fide residents of the City of Houston, Harris County, Texas, and timely filed income tax returns for that year with the Collector of Internal Revenue, Austin, Texas, which is within the Circuit of the United States Court of Appeals, Fifth Circuit. A. J. Whipple and Mildred Whipple file this petition pursuant to the provisions of Section 7483 of the Internal Revenue Code of 1954.

Prior Proceedings.

On October 27, 1956, the Commissioner of Internal Revenue determined a deficiency in federal income taxes against petitioners, A. J. Whipple and Mildred Whipple, for the calendar year 1952 in the amount of $2,379.83, and for the calendar year 1953 in the amount of $17,625.78, and penalties aggregating $2,379.83, notice of deficiency being sent [fol. 47] to petitioners by letter dated that day.

Petitioners filed a petition for redetermination of these taxes in the Tax Court of the United States on January 22, 1957.

By admission, stipulation and agreement the issues to be decided by the Tax Court were (1) whether a $56,975.10 debt owed to petitioners in 1953 which became uncollectible in that year was a business or nonbusiness bad debt within the meaning of section 23(k), and (2) whether $3,349.50, paid by petitioners in 1953 to D. M. Dozier, was a deductible business expense or a capital expenditure. Petitioners abandoned, on brief, all alleged errors in regard to the imposition of additions to tax under section 294(d), except as to the correct amount of additions to tax due for 1953 under section 294(d)(1)(A) which could be resolved in accordance with Rule 50 after the major issues presented for the Court's decision were disposed of. Other issues raised by the pleadings were either conceded or resolved by stipulation.

The Tax Court of the United States rendered its decision on June 13, 1960, holding that:

1. The $56,975.10 bad debt loss in question was not incurred in any trade or business conducted by petitioners, and was instead a nonbusiness bad debt loss to be treated as a short-term capital loss under Section 23(k)(4) I.R.C. 1939;

2. The $3,349.50 paid D. M. Dozier were payments which were ordinary and necessary as compensation for contributing services and not a part of a commission on the purchase of specific property;

[fol. 48] 3. Respondent's determination of additions to tax under Section 294(d)(2) for the year 1952 were disallowed;

4. Respondent's determination of the addition to tax determined for 1953 under Section 294(d)(1)(A) were upheld;

5. Respondent's addition to tax determined under Section 294(d)(e) for the year 1953 was upheld;

6. Respondent's addition to tax for the year 1953 under Section 294(d)(1)(B) was disallowed.

Nature of the Controversy.

A. J. Whipple purchased the Mission Orange Bottling equipment and inventory of the Mission Orange Bottling plant in Lubbock, April 28, 1951, from D. C. Casey and assumed the lease on the premises at 2518 Avenue H, Lubbock, Texas. The franchise of Mission Orange Bottling Company was transferred to Petitioner A. J. Whipple individually and has been retained in his name individually to date. Mr. Whipple operated this plant for several months as an individual, but in June, 1951, because of the fear of personal liability from products being sold and to allow a few friends and associates to invest in a part of the business, organized Mission Orange Bottling Company of Lubbock, Inc., for the purpose of limiting liability. Mr. Whipple himself later personally operated a machine vendor operation selling Mission Orange bottling products through vending machines as a joint venture on the side with two employees of the corporation.

Unfortunately, the new plant did not result in as much increased production as anticipated and the hoped for price increase did not occur. During the year 1953 the corpora- [fol. 49] tion lost more and more money and by December 1953 was completely insolvent without enough assets to pay off its obligations. By that time the corporation owed Mr. Whipple $120,447.86 and outside creditors approximately $80,000.00. About the only assets of the corporation which were worth anything were the plant equipment. Therefore, on December 15, 1953, Mr. Whipple entered into an agreement with the corporation under which he took the plant equipment and credited the corporation with its approximate book value of $70,000.00 at the same time he paid into the corporation $48,000.00, which was enough to pay off all other current obligations.

After the equipment had been taken out of the corporation on December 15, 1953, the corporation had virtually no assets out of which his balance of $56,975.10 could be paid, and this bad debt thereby became worthless. The only hope then of salvaging anything was to be able to sell the plant and equipment, which he has tried unsuccessfully since that time to do. When this bad debt became worthless, therefore, Mr. Whipple was the owner of the building and all of the physical equipment of the plant and was actually managing the plant.

Over a period of years petitioner, A. J. Whipple, had promoted, organized, managed, financed, equipped, and loaned money in connection with numerous and varied enterprises, and continued to do so through the calendar years 1952 and 1953. Petitioner, therefore, treated the $56,975.10 loss as a business bad debt, but the Commissioner of Internal Revenue's Assessment of Deficiency was based on its being treated as a non-business bad debt and hence a capital loss.

D. M. Dozier was a Federal Housing Administration Field Superintendent on a construction job in which peti-[fol. 50] tioner was involved in 1951 and petitioner made him a proposition which brought Dozier to work for him on a salary, expense account, and a percentage of the profits (Tr. 95 and 96). The 15% profit sharing agreement was an across-the-board arrangement under which he got 15% of the profits of all joint ventures, partnerships, corporations and individual land deals in which petitioner had an interest except Whipple Lumber Company (Tr. 97).

In February, 1953, D. M. Dozier left petitioner's employ and in settlement was paid a total of about $29,000.00 for his share in the profits and anticipated profits in the various enterprises. In the case of the Westheimer land, $3,349.50 was 15% of the anticipated profits. The land had not been sold but it had gone up in value (Tr. 100). D. M. Dozier had not done any work on the Westheimer land but the anticipated profits from this land were used as a partial measure of his compensation in the over-all settlement (Tr. 99-100).

The Commissioner of Internal Revenue in assessing a deficiency charged the $3,349.50 to the cost of Westheimer

land, on which a long term capital gain was realized. This left the question of whether the $3,349.50 was properly an ordinary or a capital expenditure.

Petitioners respectfully submit that the finding of the Tax Court that the $56,975.10 loss for the year 1953 was a nonbusiness bad debt was erroneous, in that it was not supported by the evidence and is an erroneous conclusion of law from the facts and evidence presented at the trial of the case, as more specifically set forth in the assignments of error which follow. Accordingly, petitioners on review petition that the decision of the Tax Court of the United States be reviewed by the United States Court of [fol. 51] Appeals, Fifth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Assignments of Error.

1. The Tax Court of the United States erred in finding that petitioner, A. J. Whipple, was not in the business of dealing in enterprises by promoting, organizing, financing, and managing corporations, partnerships, joint ventures, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953.

2. The Tax Court of the United States erred in finding that petitioner, A. J. Whipple, was not in the business of financing corporations and lending money, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953.

3. The Tax Court of the United States erred in finding that petitioner, A. J. Whipple, was not in the business of bottling soft drinks, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953.

4. The Tax Court of the United States erred in failing to make any finding as to petitioners' contention that petitioner, A. J. Whipple, was in the business of acquiring, owning, expanding, equipping, and leasing bottling plants

and other equipment, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953.

[fol. 52] 5. The Tax Court of the United States erred in finding that petitioner was not engaged in a combination of activities which together constituted a business, out of the conduct of which business the $56,975.10 bad debt loss resulted in the calendar year 1953.

A. J. Whipple, Mildred Whipple.

Duly sworn to by A. J. Whipple, jurat omitted in printing.

Duly sworn to by Mildred Whipple, jurat omitted in printing.

[fol. 53] Charles Dillingham, Ben H. Schleider, Jr., Attorneys for Petitioners.

Charles Dillingham, Ben H. Schleider, Jr., 802 Texas National Bank Bldg., Houston 2, Texas.

BEFORE THE TAX COURT OF THE UNITED STATES

NOTICE OF FILING PETITION FOR REVIEW—
Filed September 7, 1960

To: Mr. Hart H. Spiegel, Chief Counsel, Internal Revenue Service, Washington, D. C.

You are hereby notified that the above-named petitioner did on the 7th day of September, 1960, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Fifth Circuit, of the decision of this Court heretofore rendered in the above entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

[fol. 54] Dated this 7th day of September, 1960.

Charles Dillingham, Attorney for Petitioners.

Acknowledgment of service (omitted in printing).

BEFORE THE TAX COURT OF THE UNITED STATES

STIPULATION OF FACTS—Filed April 21, 1959

It is hereby stipulated that the following facts are true, provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein.

1. Albert J. (also known as A. J.) and Mildred Whipple, husband and wife throughout the period herein involved, are residents of Houston, Harris County, within the Collection District of Austin, Texas, where they filed their joint individual income tax returns as more fully hereinafter set forth.

2. Albert J. Whipple, as head of the marital community within the meaning of the community property laws of the State of Texas, will hereinafter be referred to as petitioner.

[fol. 55] 3. In the income tax return of petitioners for the calendar year ending December 31, 1952, a deduction of $347.00 for dues for memberships in various organizations was claimed as a business expense. Petitioners and respondent stipulate and agree that such deduction be disallowed in determining the income tax deficiency of petitioners for the calendar year 1952.

4. Petitioners further agree that in the income tax return filed by petitioners for the calendar year ending December 31, 1953, petitioners claimed a deduction in the amount of $250.00 on account of a worthless oil and gas lease. Of the total claimed the sum of $186.61 is admittedly deductible, and it is so agreed by petitioners and respondent, but the balance of $63.39 should be disallowed as a deduction and petitioners and respondent so agree.

5. In the income tax return of petitioners for the calendar year ending December 31, 1953, a deduction of $145.00 for dues for memberships in various organizations was claimed as a business expense. Petitioners and respondent stipulate and agree that such deduction be disallowed in determining the income tax deficiency of petitioners for the calendar year 1953.

6. In the income tax return of petitioners for the calendar year ending December 31, 1953, petitioners claimed a deduction of $5349.50 as an ordinary and necessary business expense. This $5349.50 consisted of payments of $2000.00 to R. F. Jordan, $3349.50 to D. M. Dozier. Petitioners and respondent agree that the payment to R. F. Jordan in the amount of $2000.00 constitutes a part of the cost of acquiring land and should be added to the price of such property in computing the long term capital gain from the sale of such land, but as to the $3349.50 paid to [fol. 56] D. M. Dozier, petitioners reserve the right to prove by competent evidence that said sum was appropriately deducted as an ordinary and necessary business expense.

7. On May 11, 1951, petitioner acquired, as an original incorporator, $250.00 worth of the initial capital stock of Texas International Manganese Corporation. Petitioner paid $250.00 in cash for such stock. On April 30, 1953, the corporate charter of Texas International Manganese Corporation was forfeited for failure to furnish proof of final payment of all of the subscribed but unpaid for capital stock. Petitioner and respondent agree that such stock became worthless in the year 1953.

8. That as of December 31, 1953, Mission Orange Bottling Co. of Lubbock, Inc., was indebted to petitioner, A. J. Whipple, in the amount of $56,975.10, and that such debt had become worthless in 1953, and the sole issue remaining as to said sum of $56,975.10 is whether said sum is a business bad debt or a non-business bad debt within the meaning of Section 23(k)(1) or Section 23(k)(4), respectively, Internal Revenue Code of 1939.

9. On April 17, 1951, D. C. Casey, the owner of Mission Orange Bottling Co. of Lubbock, Inc., entered into an agreement, as seller, with A. J. Whipple, as purchaser, whereby D. C. Casey granted to A. J. Whipple an option to purchase Mission Orange Bottling Co., a proprietorship operated by Casey. A photostat of said agreement is hereto attached, marked Exhibit 1-A and made a part hereof.

10. One of the principal conditions of the Casey-Whipple purchase option, see Exhibit 1-A hereto, was that A. J.

Whipple obtain an assignment or a new lease from the [fol. 57] premises on which Mission Orange Bottling Co. was then conducting its business. By lease dated April 21, 1951, O. L. Nelms, the owner of the premises in question, entered into a lease with A. J. Whipple, as lessee, leasing the bottling business premises. A copy of this lease is hereto attached, marked Exhibit 2-B and made a part hereof. Another prime condition of the Casey-Whipple purchase option, see Exhibit 1-A hereto, was that A. J. Whipple obtained a franchise from Mission Dry Corporation, a Delaware corporation operating in the State of California, which franchise would authorize A. J. Whipple to distribute Mission Orange beverages. On April 25, 1951, Mission Dry Corporation granted a franchise to A. J. Whipple, doing business as Mission Orange Bottling Co., Lubbock, Texas. A copy of this franchise is hereto attached, marked Exhibit 3-C and made a part hereof for all purposes.

11. On April 27, 1951, D. C. Casey, pursuant to the purchase option previously granted to A. J. Whipple, see Exhibit 1-A hereto, transferred by bill of sale the machinery and equipment of Mission Orange Bottling Co., located at 2518 Avenue H in the City of Lubbock, Lubbock County, Texas, substantially according to the terms of the purchase option as shown by the excerpt from A. J. Whipple's books prepared by Mr. Edward Daniels of Ernst and Ernst, a photostatic copy of which is hereto attached as Exhibit 4-D1. A copy of the bill of sale from D. C. Casey to A. J. Whipple making the transfer is hereto attached, marked Exhibit 4-D2, and made a part hereof.

12. Upon consummation of the purchase option with D. C. Casey, A. J. Whipple assumed operations of Mission Orange Bottling Co., a sole proprietorship, and filed an assumed name certificate in Lubbock County reflecting that [fol. 58] A. J. Whipple was operating under the assumed name of Mission Orange Bottling Co. A copy of this certificate, dated April 27, 1951, is hereto attached, marked Exhibit 5-E and made a part hereof.

13. Mission Orange Bottling Co. of Lubbock, Inc., hereafter referred to as "Mission Orange", was incorporated

on June 8, 1951, under the laws of the State of Texas. The authorized capital stock was $20,000.00 represented by 200 shares of common stock of the par value of $100.00 per share. About the date of incorporation, $10,000.00, or 100 shares were issued for cash as follows:

A. J. Whipple	88	$ 8,800.00
Others	12	1,200.00
Total	100	$10,000.00

14. A. J. Whipple continued to operate Mission Orange Bottling Co. as a sole proprietorship from the date of its acquisition until July 1, 1951, at which time Mission Orange, the corporation which Whipple had previously chartered, became operational. A copy of the book entry setting forth the assets which Mission Orange, the corporation, acquired from the sole proprietorship is hereto attached, marked Exhibit 6-F and made a part hereof.

15. In late 1951 or early 1952 A. J. Whipple purchased a tract of land with a view of erecting a new bottling plant site, which construction was completed in the early portion of 1952. The land was acquired by A. J. Whipple personally at a cost of $4,589.75, and a bottling plant building was constructed at a cost of $39,011.95, for a total combined cost [fol. 59] of $43,601.70 to A. J. Whipple individually. On August 1, 1952, Mission Orange occupied the new plant under a lease obtained from A. J. Whipple. A copy of this lease dated July 14, 1952, is hereto attached, marked Exhibit 7-G and made a part hereof.

16. On December 1, 1951, petitioner acquired a restaurant known as "Cousins" which had been operating at 4401 Fannin Street, Houston, Texas. He continued to operate said restaurant until June 1, 1953, when it was sold or otherwise disposed of, according to the 1953 individual return.

17. Pursuant to a stockholders' meeting, the charter of Mission Orange was amended so as to increase its authorized capital stock from $20,000.00 to $40,000.00, which addi-

tional stock was divided in 200 shares each of the par value of $100.00, all of which additional stock was fully subscribed and 100% paid in in its entirety by A. J. Whipple in cash. This amendment was filed in the office of the Secretary of State December 8, 1952, and a copy thereof, marked Exhibit 8-H is hereto attached and made a part hereof.

18. Following such increase in the capital stock, the stock ownership on December 8, 1952, was as follows:

A. J. Whipple	308 shares	$30,800.00
Jas. A. Finly	10 shares	1,000.00
Charles Dillingham	2 shares	200.00
Cecil Clark	20 shares	2,000.00
Dora B. Ellzey	10 shares	1,000.00
D. M. Dozier	10 shares	1,000.00
Jack Knostman	20 shares	2,000.00
James F. Webster	20 shares	2,000.00
		$40,000.00

[fol. 60] 19. As of December 1, 1953, Mission Orange Bottling Co. of Lubbock, Inc., was indebted to A. J. Whipple in the amount of $56,975.10. A copy of the summary of how this indebtedness arises is hereto attached, marked Exhibit 9-I and made part hereof.

20. On December 15, 1953, Mission Orange by bill of sale transferred the bottling machinery and equipment described in an exhibit to the bill of sale. A copy of this bill of sale, marked Exhibit 10-J is hereto attached and made a part hereof.

21. The schedule, stipulations and W-2 Forms attached to petitioners' income tax returns of 1950 showed income received from the following enterprises as set forth in photostatic copy of same, marked Exhibit 11-K and made a part hereof.

22. The schedules and W-2 Forms attached to petitioners' 1951 income tax return show income received from the following sources:

Bottling Plant
Salaries received from 3 corporations
Schedule C Restaurant
Interest Received from 16 corporations, partnerships and individuals
Sales of interests in 13 corporations as shown in detail on copy of return, marked Exhibit 12-L made a part hereof.

23. On March 18, 1953, petitioners filed a joint individual income tax return, Form 1040, for the taxable year 1952. Photostat thereof is hereto attached, marked Exhibit 13-M, and made a part hereof, showing income from the following sources:

[fol. 61]

Form No.	Company	Exhibit No.
W-2	Whipple Lumber Company	13-M1
W-2	Whipple Construction Company	13-M2
W-2	Whipple Equipment Co., Inc.	13-M3
W-2	Angelton Homes Corp.	13-M4
W-2	Dozier-Whipple Const. Corp.	13-M5
1099	Federated Department Stores, Inc.	13-M6
1099	Durham-Clark Building Supply Co.	13-M7
1099	Whipple Lumber Company	13-M8

Interest received from 14 corporations, partnerships, and corporations:
Restaurant
Partnership
Lee County Oil Lease
Rent Purse Houston
Rental Building in Lubbock

24. Petitioner, A. J. Whipple was an original incorporator of the corporations formed on the dates set forth in letter from Secretary of the State of Texas to Charles Dillingham dated marked Exhibit 14-N and made a part hereof.

25. Petitioner, A. J. Whipple was an original incorporator of Angelton Building and Holding Corp., as shown by certified photostatic copy of Charter No. 109540 dated

February 25, 1952, hereto attached as Exhibit 15-O and made a part hereof.

26. After an examination, the revenue agent in a report dated June 1, 1955, photostat of which was transmitted to petitioners by the District Director, Austin, Texas, on September 16, 1955, disclosed deficiencies in and additions to tax for 1952 and 1953. Photostat thereof is hereto attached, marked Exhibits 16-P and 16-P1 and made a part hereof.

[fol. 62] 27. On February 8, 1956, petitioners executed and filed a "Consent, Form 872" for the taxable year 1952, which Consent was also executed by respondent. Photostat thereof is hereto attached, marked Exhibit 17-Q and made a part hereof.

28. On October 5, 1955, petitioners executed and filed a protest to the report dated June 1, 1955, previously referred to above. Photostat thereof is hereto attached, marked Exhibit 18-R and made a part hereof.

29. On October 22, 1956, by registered mail, statutory notice of deficiencies in tax and additions to the tax for the taxable years 1952 and 1953 were mailed to petitioners. A copy of said statutory notice, attached to the petition as Exhibit "A" is by reference attached hereto as Exhibit 19-S.

30. On January 14, 1954 petitioners filed a joint Declaration of Estimated Tax, Form 1040 ES, photostat of which is hereto attached, marked Exhibit 20-T1, and made a part hereof. On March 11, 1954 they also filed a joint individual income tax return, Form 1040, which is also attached, marked Exhibit 20-T and made a part hereof. In the schedules attached to the return income was shown as received by petitioner as follows:

Salaries from 6 corporations
Interest from 4 parties
One partnership
Rent from three properties

31. It is further stipulated that the issues pertaining to the capital loss on Texas International Manganese Cor-

poration stock, dues and subscriptions, $2,000.00 paid to [fol. 63] R. F. Jordan shall be disposed of by Rule 50 computation.

Charles Dillingham, Ben H. Schleider, Jr., Counsel for Petitioners, Arch M. Cantrall, FSG, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 65603

[Title omitted]

Transcript of Hearing—Tuesday, April 21, 1959

(Met, pursuant to Calendar Call, at 2:50 o'clock p.m.)

Before: Hon. Clarence V. Opper, Judge.

APPEARANCES:

Ben H. Schleider, Jr., Esq., Charles Dillingham, Esq., 802 Texas National Bank Building Houston, Texas, appearing on behalf of Petitioner.

D. Louis Bergeron, Esq., (Hon. Arch M. Cantrall, Chief Counsel, Internal Revenue Service) 5000 Internal Revenue Building, Washington, D. C., appearing for Respondent.

[fol. 64] Proceedings.

The Clerk: Docket No. 65603, A. J. and Mildred Whipple. State your appearances.

Mr. Schleider: Ben H. Schleider, Jr. and Charles Dillingham for the Petitioner.

Mr. Bergeron: D. Louis Bergeron for the Respondent. Ready for trial.

The Court: You gave two names, but I see only one of you here.

Mr. Schleider: Mr. Dillingham just stepped out in the hall.

The Court: He will be here?

Mr. Schleider: Yes, sir.

The Court: Are you ready to proceed?

OPENING STATEMENT ON BEHALF OF PETITIONER

Mr. Schleider: Yes, Your Honor.

May it please the Court, we have heretofore stipulated, and with the exception of some brief comments, I will confine the bulk of my statement to the factual issues [fol. 65] which we understand to be before the Court at this time, aside from the stipulation.

This suit involves petition for deficiency for the calendar years 1952 and 1953 for Mr. and Mrs. Whipple. The calendar year 1952 has been admitted insofar as certain deductions, or stipulated insofar as certain deductions are concerned, and we have agreed they may be disallowed or should be disallowed.

As to the year 1952 there still is the question of penalties by reason of an improper estimate of tax.

Now, it's our belief that they, in the main, involve questions of law except to the extent that the evidence comes before the Court here in some other matters which will also bear on the estimate tax. We will introduce no independent evidence on that estimate for the failure to file an estimate.

There also is the matter of interest for 1952 which we likewise believe is a question law.

For the year 1953, the Commissioner determined a deficiency and the Petitioners have stipulated with Respondent that with the exception of two items, such deficiencies which were in the main entertainment, dues and the like, may be disallowed.

The two principal contested deductions are an item of $56,975.10 which was claimed by Petitioners as a business deduction and which the Commissioner disallowed and said should be treated as a non-business deduction, in other words, within the meaning of Section 23 (k) (1) or Section 23 (k) (4), respectively.

The second item is $3,349.50. This is out of an amount of $5,349.50 which was taken as a business deduction by Petitioners, and of the $5,349.50, $2,000 was stipulated

should be allowed, leaving the balance in controversy of $3,349.50.

[fol. 66] We believe as to that $3,349.50 the evidence will show and we will so attempt to show that it involved a portion of a profit-sharing arrangement with one D. M. Dozier which spread over several enterprises owned by A. J. Whipple.

The Court: Before you get into the merits here and while you are still on what the issues are, I would like to see if I can follow through on your petition. I am having difficulty.

I believe there was only one petition. Now, leaving—starting at the end and leaving out assignments or error G and H which refer to 1952—

Mr. Schleider: Yes, sir.

The Court: —and also leaving out F and E, which are the penalty assignments, as I read them—

Mr. Schleider: Yes, sir.

The Court: —that leaves A, B, C, and D to cover these matters that you say are still in issue.

Mr. Schleider: Yes, sir.

The Court: Now, A is an expense item—

[fol. 67] Mr. Schleider: That we have stipulated should be disallowed.

The Court: You have stipulated that out of the case?

Mr. Schleider: That's right.

The Court: B is set up not as—not as the issue that you state—but here it appears to be a question of whether it should be capitalized as an expense. Now, is that still the issue?

Mr. Schleider: As to $3,349.50 of the original $5,349.50. In other words, as to the man Dozier we say it still should be treated as an ordinary expense; as to the man Jordan, which represents $2,000, we have stipulated it may be disallowed and treated as a capital item, which is consistent in part with what the Commissioner determined.

The Court: Now, which is the one that you say is a 23 (k) item?

Mr. Schleider: We say the next item, which is C, involving $56,975.10—

The Court: It is set up as a bad debt item. I understood it was an attempt to take a bad deduction.

Mr. Schleider: It is a business bad debt.

[fol. 68] The Court: Is it conceded there was a bad debt?

Mr. Schleider: The stipulation which we will offer—

Mr. Bergeron: It's a question of whether it's a business bad debt or a non-business bad debt to the tune of $56,975.10.

The Court: Now, what about D?

Mr. Schleider: Now, D—and I might say here, Your Honor, there is an error, typographical error; that should be $250 instead of $2,500. But we have covered that by stipulation.

The Court: You mean that is out of the case?

Mr. Schleider: That is out of the case.

So we really have a part, to summarize, we have a part B to the extent of $3,349.50 involving a man Dozier. And as to the C, you have the question of business bad debt or non-business bad debt in the amount of $45,975.10.

The Court: Now, as I understand it, those are really the only two issues you will have evidence on.

Mr. Schleider: That is right, sir. We have confined ourselves to the unstipulated portion here, and I think as a matter of brevity it lends itself better to do it that way.

[fol. 69] The Court: Thank you.

Mr. Schleider: I might say on the $56,975.10 item which I will hereafter refer to as the bad debt item, for brevity, we consider there are three principal issues involved from which we will attempt to show by evidence and attempt to substantiate it:

Number one, the Petitioner, A. J. Whipple, was in the business, as the usual type of situation that is raised in these cases, of acquiring, financing, and organizing corporations.

Number two, that he was in the business of acquiring, owning, equipping, and leasing a bottling plant.

And number three—

The Court: You mean he, Petitioner?

Mr. Schleider: Yes, sir, Petitioner.

The Court: Not through a corporation?

Mr. Schleider: He was leasing it to a corporation, the bottling plant. And in addition to that, there is another facet of it, that he was also in the soft drink business.

Now, the second and third might be stated, alternative arguendo, but our argument is most helpful on the side that he was actually in the drink business.

The Court: You mean he as an individual?

[fol. 70] Mr. Schleider: When I say "he" I refer to Mr. Whipple, the Petitioner, as an individual.

I am not going to summarize a great deal of evidence because I don't think it would do anything but consume time. We can do that as well and rapidly from the witness stand itself. I will just say that in general, Mr. Whipple's operation and the ones we intend and hope to project before the Court here, cover a period of approximately fifteen years, that is, beginning approximately in 1940 and coming on through the year 1953. We may, in an isolated instance pass 1953 but not to any degree at all.

We will attempt to show by this evidence that Mr. Whipple was engaged in a number of corporate enterprises in which he actively managed those corporations, that he was involved in partnerships in which he participated as an active partner; that he was involved in a limited partnership in which he was a general partner; and that he generally was a man to whom business deals could be brought with a view of turning a profit.

He was more than an investor. I would say he bordered on a promoter category, and the evidence we believe will so show.

In addition to operating a bottling plant, as we choose to call it, we say Mr. Whipple was also engaged individually in the restaurant business. And while his activities involved the construction field and construction products and building products, he did go out into various deals, oil deals and various types of ventures.

The operations of Mr. Whipple insofar as the particular business at question is concerned relates to some advances which Mr. Whipple has made to Mission Orange Bottling Company, Inc. Now, throughout this record I would like to say here again, for clarity, that we will refer to Mission Orange as the corporation.

[fol. 71] There was also a time, and this was in the initial stage when Mr. Whipple himself, as an individual, did

business as Mission Orange in a sole proprietorship capacity. But when we say Mission Orange, we will refer to the corporation, because it has a rather long name and I thought that would shorten it, and that is the way we have treated it in the stipulation.

When we talk about "he" or the Petitioner, we are talking about Mr. Whipple, not only in his capacity as a private citizen, but Mr. Whipple in his capacity as Mission Orange Bottling Company, sole proprietorship.

Now, in addition to Mr. Whipple's operations, we believe the evidence will show he first started out operating as a sole proprietorship; he subsequently incorporated, but at all times retained the franchise. He made various advances which aggregated the net figure $56,975.10. And it's also stipulated that the debt was worth less in 1953 and that as of the close of that year, that sum of $56,975.10 was due and owing to him by Mission Orange.

As to the item on the Dozier matter, it will not take a great deal of evidence to develop. It was simply a question of what the profit-sharing agreement and arrangement was between Mr. Whipple and D. M. Dozier.

Unless His Honor has some questions and wants some clarification on points, I believe that concludes our opening statement.

OPENING STATEMENT ON BEHALF OF RESPONDENT

Mr. Bergeron: As to that D in paragraph four, we originally disallowed $2500 as being an unsubstantiated claimed cost of Texas Manganese stock. However, they were able to produce records which shows Mr. Whipple paid $250 for that stock, so in a computation that $250 will be reflected as a loss to Mr. Whipple on that particular stock.

Now, with reference—

[fol. 72] The Court: That is covered in the stipulation?

Mr. Bergeron: Yes. The closing paragraph of the stipulation shows what items will be made the basis of a Rule 50 computation.

The Court: Well, I hope it shows more than that, it shows how they will be disposed of.

Mr. Bergeron: Yes, sir, in a Rule 50 computation.

The Court: All right.

Mr. Bergeron: With reference to the $56,000, more or less, bad debt as of December 31, 1953, it is the Respondent's position that Mr. Whipple throughout his experience in the business world was not in the business of lending money; that he had made this investment and that he lost his money as a non-business bad debt, and that it was properly reflected in the statutory notices as a short-term capital loss.

With reference to Mr. Dozier's $3,349 50, it was shown in Mr. Whipple's own books as being a cost of a certain tract of land which was sold in 1953 and so reflected in the return; and we contend that the Respondent properly added that to the cost of the sale of that particular tract known as the Westheimer Tract, and the evidence will show it.

So that the only two issues before the Court really, this afternoon, are the $56,000 which whether it's a business or [fol. 73] non-business bad debt, and whether the Respondent properly determined that the payments to Dozier were additional costs in arriving at the capital gain from the sale of the Westheimer Tract.

The Court: Well—

Mr. Schleider: Let me just make this observation.

I was in error. I guess I had the impression, but I notice in looking at our copy of the deficiency notice, that $2500 was in there. I treated it as a typographical error, and I apologize to the Court.

Mr. Bergeron: I didn't mean to question your statement. I thought I would give the Court the facts.

The Court: Of course, I don't know yet what happens to the other $2,250 but I assume you covered that in your—

Mr. Bergeron: Yes. Somebody made a mistake.

Mr. Schleider: The typographical error was on the return. Not on the petition for deficiency. We have covered that.

The Court: We will take a ten-minute recess.

(Recess.)

[fol. 74] Mr. Schleider: May it please the Court, instead of presenting the stipulation in the normal order, I have

a gentleman I would like to put on the stand at this time in order that he might catch a 4:25 plane.

The Court: Do you have any objection?

Mr. Bergeron: No objection, Your Honor.

C. L. Barnhart was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Have a seat and state your name and address, please.

The Witness: C. L. Barnhart, 3800 South Hills, Fort Worth.

Direct examination.

By Mr. Schleider:

Q. Mr. Barnhart, you know Mr. A. J. Whipple, do you not?

A. I do.

Q. When did you first make Mr. Whipple's acquaintance?

A. In 1951, I believe.

Q. What were the circumstances under which you made his acquaintance?

A. At that time, I was district representative for the Mission Dry Corporation, and Mr. Whipple was acquiring [fol. 75] or was fixing to acquire the Mission Bottling Company at Lubbock, and he was making application for a franchise.

Q. And what is Mission Dry Corporation?

A. They are manufacturers of bases for bottlers.

Q. Have you been in the bottling business for any length of time?

A. Since 1934.

Q. You have been in the bottling business consistently during that period of time?

A. Yes, sir.

Q. Are you presently engaged in the bottling business?

A. I am, sir.

Q. To what extent?

A. I have a plant in Fort Worth and I also have one in Wichita Falls, Texas.

Q. And in those plants you fabricate beverages, I mean, bottled beverages, soft drinks, and distribute them?

A. Yes, sir.

Q. Were you employed by Mission Dry Corporation?

A. Yes, sir.

Q. What was the nature and extent of your employment?

A. I was district representative for them for Texas and Oklahoma.

Q. And was Lubbock in your district?

A. Yes, sir.

Q. How long have you operated your own bottling plant?

A. Since May 5, 1934.

Q. And in addition to that, you have been connected with Mission Dry Corporation as a district representative?

A. Right.

Q. You said you made an acquaintance in early 1951 with Mr. Whipple, am I right about that?

[fol. 76] A. I believe it was either late 1950 or 1951.

Q. And where did you make his acquaintance?

A. In Houston, Texas.

Q. What were the circumstances that caused you two to come together?

A. I was on the road at that time for Mission, and if I recall correctly, I believe it was in Franklin, Texas, and the Mission Dry Corporation contacted me by telephone and told me that Mr. Whipple was acquiring the Lubbock plant, and asking for a franchise, and asked me to go to Houston and see Mr. Whipple as to whether I thought he would be qualified for a franchise.

Q. And did you make any investigation into Mr. Whipple?

A. Yes, sir, I did.

Q. What was the nature of your investigation?

A. I investigated him through the bank, through the Dun and Bradstreet, and through the Credit Association.

Q. What was the purpose of Mission Dry Corporation actually sending you out to find out about Mr. Whipple?

A. Well, to see if in my opinion Mr. Whipple was financially able to handle the bottling plant and if he had the business ability.

Q. Was that looking to the operation and management of a bottling plant at Lubbock?

A. Yes, sir.

Q. What did your investigation result in?

A. Well, after the investigation, I thought he was qualified for it and recommended to the company that they issue him a franchise.

Q. And was a franchise issued?

A. It was.

Q. Was it shortly afterwards?

A. Yes, sir.

[fol. 77] Q. And did you subsequently, after Mr. Whipple operated in Lubbock, did you have any occassion to deal with him further?

A. Yes, sir.

Q. What was the nature of your dealings with Mr. Whipple on the subsequent occasions?

A. Well, I had been several times called to Lubbock or had called Mr. Whipple and asked him to meet me in Lubbock in regards to the operation of the plant.

Q. What was your reason for doing that? Were you supervising the operation of the franchise and operation under it?

A. From a franchise standpoint only.

Q. You were concerned as the Mission Dry Corporation representative, with the manner in which the Lubbock bottling plant was being conducted under the franchise?

A. Right.

Q. Now, did this franchise continue from the time it was granted until December 31, 1953, in Mr. Whipple's name?

A. Yes, sir.

Q. Was the franchise issued to Mr. Whipple personally or to some corporation?

A. It was issued to Mr. Whipple personally.

Q. You know that of your own knowledge?

A. Yes, sir.

Q. On these occasions that you met with Mr. Whipple in Lubbock, Texas, what did you discuss with Mr. Whipple?

A. Well, I discussed the business operation of the business with him.

Q. And did you discuss anything about the affairs and manner of handling the business?

A. Yes, sir.

[fol. 78] Q. Are they the type discussions that you would have with the manager of a business?

A. No, sir. It was not from just—if you are referring to a resident manager or—

Q. I mean an overall general manager.

A. Yes.

Q. You had, I take it, several occasions to talk with Mr. Whipple; is that correct?

A. Yes, sir.

Q. In dealing on franchise matters connected with Mission Orange at Lubbock, did you go to Mr. Whipple in discussing those matters?

A. Yes, sir.

Q. You didn't discuss those with anybody on the ground necessarily?

A. No, sir.

Q. You have been in the bottling business and I take it you have had occasion through your twenty five years to observe people in the bottling business; is that right?

A. Yes, sir.

Q. And you are familiar with the operations of the bottling business, are you not?

A. Yes, sir.

Q. Would you say from the way you saw Mr. Whipple operate that he was a manager of a bottling business?

A. I would say he was.

Q. Would you say he was in the bottling business?

A. Yes, sir, I would.

Q. Isn't it a fact that Mr. Whipple operated pretty much like you do with respect to your Wichita Falls plant?

A. Yes, sir, he does.

Q. In other words, you live in Fort Worth, don't you?

[fol. 79] A. Right.

Q. And you have a plant in Wichita Falls?

A. Yes, sir.

Q. You have a local manager?

A. Yes.

Q. Do you consider you are in the bottling business in Wichita Falls?

A. Yes, sir.

Q. Did Mr. Whipple ever participate in any bottling conventions or anything of the sort?

A. Yes, sir, he did.

Q. Did you personally observe him at any bottling conventions?

A. Yes, sir.

Q. And did you discuss the bottling business with Mr. Whipple?

A. Yes, sir.

Q. Who made the major decisions up in the Mission Orange Plant in Lubbock after Mr. Whipple acquired it and started operating up there?

A. As far as I was concerned, Mr. Whipple did.

Q. And on major policy decisions, he would be the prime person to make those decisions?

A. Yes, sir.

Mr. Schleider: I believe I have no further questions.

Cross examination.

By Mr. Berger n:

Q. You state you were connected with the Mission Dry Corporation, is that it?

A. Yes, sir.

Q. Are you a stockholder of that Mission Dry Corporation?

[fol. 80] A. No, sir.

Q. What was your capacity with them?

A. District manager, or district representative.

Q. In addition to running your own bottling concerns?

A. Yes, sir.

Q. Were you on a salary with Mission Dry Corporation?

A. I was on a commission.

Q. You were on a commission.

And you stated that you saw Mr. Whipple on several occasions at bottling conventions?

A. Yes, sir.

Q. Do you know when those conventions were held?

A. Well, they were held in January; I couldn't tell the exact date.

Q. What year would you say?

A. 1951, 1952, and—

Q. You mean 1954 now?

A. I believe 1951. I can't recall the exact dates, but I know 1952.

Q. Because you stated that you contacted Mr. Whipple around April, 1951.

A. Yes, that was for a franchise.

Q. Was he at the convention in January prior to his becoming—

A. Well, I don't remember whether he was at the convention in 1951. He was in 1952.

Q. What other years did you see him at the convention?

A. Well, I saw him at the convention in 1953 and 1954, I believe.

Q. Did you have—were you in your capacity with Mission Dry interested in the management of the corporation owned by Mr. Whipple?

A. Beg your pardon?

[fol. 81] Q. Were you interested in any part of the business owned by Mr. Whipple known as Mission Orange Bottling Company?

A. No, sir.

Q. In other words, after you assisted him in getting this franchise, you were through more or less with Mr. Whipple, is that true?

A. From a monetary standpoint, if you mean from an investment, monetary standpoint, I had none.

Mr. Bergeron: I think that is all.

Redirect examination.

By Mr. Schleider:

Q. Mr. Barnhart, in connection with your operations with Mission Dry Corporation, once a franchise has been granted, did your duties terminate at that point?

A. Oh, no. My duties went on as long as there was a bottling plant existing, as long as I was calling on them.

Q. The purpose of that was to see the particular licensee or party with the franchise was operating according to the terms of the franchise, right?

A. Right.

Q. Wasn't that part of your job?

A. Yes, sir.

Q. I believe that is all, sir.

Mr. Schleider: No further questions.

Mr. Bergeron: I believe Mr. Barnhart could be excused now.

[fol. 82] Mr. Schleider: He is going to try to make a plane at 4:25.

The Court: Well, I hope you make it.

(Witness excused.)

STIPULATIONS BETWEEN PETITIONER AND RESPONDENT

Mr. Schleider: Your Honor, at this time I think we could introduce some stipulations between Petitioner and Respondent.

I might say that they are—that there are one or two documents that we need to have photocopied.

Mr. Bergeron: Yes, we may have to withdraw some.

The Court: Well, the originals are going to be with the stipulation until you put the copies in?

Mr. Bergeron: Oh, yes, you have a complete stipulation now.

The Court: And when you put the photostats in, they will show the number.

Mr. Bergeron: But what I want to do is take some copies for myself.

The Court: Withdraw them and resubmit the same documents.

Mr. Bergeron: Yes.

[fol. 83] Mr. Schleider: Yes.

The Court: Very well, that may be done.

Stipulation received.

What is the highest exhibit number?

Mr. Schleider: Just a minute, Your Honor. We have an oral stipulation too which goes—

Mr. Bergerbn: No. On the stipulation here it goes to 20-T and 20-T-1.

Mr. Schleider: What it is, we have two W-2 forms.

Mr. Bergeron: Estimated declaration and the Return, and we gave them the same number.

The Court: I hope it isn't going to confuse us. It would have been better to give us another number.

Mr. Schleider: I don't think it will, Your Honor, because it's stapled together.

Mr. Bergeron: It's stapled together, but we wanted to identify them separately without giving them a new number.

[fol. 84] The Court: In other words, 20-T is the highest number?

Mr. Bergeron: Yes, sir.

The Court: You say you have an oral stipulation?

Mr. Schleider: Yes, Your Honor.

I'd like to dictate this into the record; the style of the case—

It is hereby stipulated that the following facts are true, provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein:

(1) That although not actually in issue in the case, in order to avoid any possible confusion, Petitioner and Respondent do stipulate and agree that by December 31, 1953 Petitioner, A. J. Whipple, had paid to Mission Orange $30,800 for the capital stock of such corporation, and acquired an additional $1000 stock from another stockholder of Mission Orange, so that as of December 31, 1953, A. J. Whipple owned $31,800 capital stock as shown in the computation of tax for the year 1953 in the deficiency notice.

(2) That the work sheets of Edwin Daniels of Ernst & Ernst, an independent accounting firm, are correct excerpts of the books and records of A. J. Whipple and of the corporation known as Mission Orange, showing the advances made by Petitioner to Mission Orange and the disposition of such advances by Mission Orange, namely, the

[fol. 85] receipt of such advances by Mission Orange from Whipple and the disbursements thereof by Mission Orange.

Copies of such work sheets, marked Exhibit 21, containing thirteen pages, which said exhibit is hereto attached and filed with the clerk.

The Court: Now, that is all part of the stipulation?

Mr. Bergeron: We reserve the right to object to the materiality based on the testimony which may be adduced this afternoon. We agree those were the figures taken from the books in order to cut down the time of the trial.

The Court: You agree to what Mr. Schleider just said?

Mr. Bergeron: Yes, Your Honor.

The Court: You don't want me to rule on the materiality at this time?

Mr. Bergeron: Oh, no. I mean at the proper time, if we feel there is an objection to the materiality, I want to reserve the right to make it.

Mr. Schleider: We offer these records to show what they reflect under the business records rule, and if Your Honor [fol. 86] please, I would like to have the right to withdraw these and refile them after they have been photocopied. I will furnish Mr. Bergeron a copy of them.

The Court: Very well.

Suppose we mark that as an exhibit on the agreement of counsel that it may be received. That won't interfere with your objection on materiality.

The Clerk: Exhibit 21.

(Whereupon the document was marked for identification as Petitioner's Exhibit 21.)

Mr. Schleider: That doesn't diminish the Court's instruction there from our considering these as though they were the original business records?

The Court: I don't understand there is any question about that. That is the result of the stipulation. Marking them as an exhibit wouldn't affect it one way or the other.

ALEX W. HEAD, was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Have a seat and please state your name and address for the record.

The witness: My name is Alex W. Head. My home address is 3826 Olympia Drive, Houston, Texas.

[fol. 87] Direct examination.

By Mr. Schleider:

Q. Mr. Head, you are acquainted with the Petitioner, Mr. A. J. Whipple, are you not?

A. Uh-huh, yes, sir.

Q. When did you first meet Mr. Whipple?

A. Mr. Whipple and I met in either late summer or early fall of 1950.

Q. And what were the circumstances or the occasion for your meeting him?

A. Mr. Whipple at that time was in some way associated with Mr. Miles Strickland and Mr. Whipple was in several side ventures, if you call them that, and—or—I forget the particulars; but I was called in in some form of discussion about he was in the process of disassociating himself from Miles Strickland so he could further his own ventures of a sort as I remember the particulars.

Mr. Bergeron: Your Honor, we don't know what this man is yet. We don't know the significance of his testimony.

Mr. Schleider: You haven't heard it all yet.

By Mr. Schleider:

Q. Mr. Head, would you tell the Court what your occupation is?

A. Oh, ostensibly I am in the oil business. But in the last few years, I have gotten into several other different ventures.

I have a mortgage company; I am a—I have a mineral company; we have a company with a couple of buildings

[fol. 88] in it. And take that as it may, what business would you say I am in? I really don't know.

Q. You are in a number of businesses?

A. I am in a number of businesses or sometimes they are in me. I don't know.

Q. Is that generally the type of operation you were carrying on in 1950 and subsequent years, particularly when you first met Mr. Whipple?

A. No. At the time I met Mr. Whipple I was primarily interested in the oil business. The fact of the business is after our first meeting, the next meeting I had with Mr. Whipple was, oh, either late 1950 or early 1951, when he and a group of people were promoting some kind or were in the process of promoting some kind of oil venture out in West Texas, and I was called in and asked if I would like to join with them in the promotion of the venture.

Q. And then when was the next time you had occasion to deal with Mr. Whipple?

A. Of course, you bear in mind some of these dates may be a little hazy. I can give you approximations only.

After that venture—

Q. You say that venture. To what—

A. I mean the West Texas venture that I referred to. We went into a venture in oil lease playup in Washington County. And shortly thereafter, almost about the same time a group of us, of which Whipple was a member, had leased a great quantity of acreage up in Lee County, which is one of the few counties in Texas on which oil has never been discovered; and we just promoted a glorious fiasco up there.

Q. Mr. Whipple was in the venture with you, is that right?

A. Yes.

[fol. 89] Q. Now, in the years 1952 and 1953, did you have occasion to deal with Mr. Whipple?

A. Well, after that venture, which lasted I guess through most of '51—

Q. You are now talking about the Lee and Washington County deal?

A. Yes, sir. After that, we were always discussing vari-

ous ventures of one sort or another. We saw a lot of each other during that time.

But about that time or prior to that, Mr. Whipple got into this bottling situation out in Lubbock. And he was having to spend a lot of time out there. And we didn't go into anything in the years 1952 and 1953, if that is primarily the years you refer to, because that thing was taking a lot of his time. He and I have gone into some things after 1953; we went into a lumber yard deal for a short length of time. And we have always had kind of a close association on trades.

Q. Let me ask you this: Have you ever discussed with Mr. Whipple any sort of manufacturing or fabricating deal or tire deal or anything of that sort?

A. Well, I should have told you that. In 1952—'53, I guess, right, it was right in there somewhere—we started to take over a kind of a sizable, well, they called it a cinder block business; it was a cinder block with a glassed front; take it over for the purpose of cleaning it up and selling it out. We worked at it for awhile and decided not to go into it; primarily, as I remember the particulars, Whipple was fightnig this tiger out in Lubbock.

Q. You refer to "this tiger out in Lubbock;" you are referring to the bottling company?

A. Subsequent events proved it to be.

Q. Mr. Head, did you discuss one or more deals with Mr. Whipple that never did consumate in any transaction? [fol. 90] A. Yes, Whipple and I were always discussing ventures of all sorts.

Q. I guess you would characterize Mr. Whipple as somewhat of a promoter type?

Mr. Bergeron: I move to strike the question as leading and suggestive.

The Court: Granted. Strike it out.

By Mr. Schleider:

Q. What kind of operator would you say Mr. Whipple was? I am talking about your own personal observation of him.

A. Mr. Whipple—

Mr. Bergeron: I object to the question on the ground that this witness hasn't proven that he is qualified to answer the question, based on his present testimony.

Mr. Schleider: Your Honor, he can always testify to his opinion of the type operation. I think that is just a shorthand rendition of facts.

The Court: I will sustain the objection.

The Witness: Now, what is the question again? It skipped me here.

[fol. 91] The Court: The objection has been sustained. You don't have to answer.

The Witness: Oh, I see. All right, sir.

By Mr. Schleider:

Q. Mr. Head, do you consider that you are somewhat of a promoter?

A. Well, I think the term "promoter" can be used rather loosely. I think I am one who gets groups together to do a certain—to perform a certain function for which I am paid for my services. If you call that being a promoter, I very definitely am.

Q. Well, do you in the course of your type operations do any actual managing or overseeing or actual direction of these operations that you get together?

A. Well—

Mr. Bergeron: I object on the ground the question is not material to whether Mr. Whipple is in that type of business or not.

Mr. Schleider: Your Honor, the objection previously was the man was not qualified to give an opinion. Now I am trying to qualify him as a promoter so he can give an opinion.

The Court: I still don't think it's material. I will sustain the objection.

[fol. 92] By Mr. Schleider:

Q. Did Mr. Whipple operate on generally the same sort of lines that you operated?

Mr. Bergeron: I move to strike. This witness hasn't shown he is qualified to testify as to Mr. Whipple's operations.

The Court: I think we are going to get into trouble going at it this way. Certainly we can get the testimony of exactly what Mr. Whipple did. This witness knows some of the things he did. And basically, what you are asking him to do is to make the decision I have to make, whether from the facts you bring out here Mr. Whipple was a promoter in the sense in which it's used in the cases.

Now, this witness couldn't help me any on that. And whether his business is similar to Mr. Whipple's or different wouldn't be material, as I can see, to this proceeding. Maybe Mr. Whipple is a promoter and this witness isn't.

I will sustain the objection.

By Mr. Schleider:

Q. Mr. Head, in connection with the various deals that you took to Mr. Whipple, did you take them to Mr. Whipple for his services that would be involved in connection with those deals?

Mr. Bergeron: I object again. The question is not material.

Furthermore, there have been no deals shown as attaching to the two years involved which would make this testimony enlightening to the Court in deciding the question of whether Mr. Whipple was a promoter or not.

[fol. 93] Mr. Schleider: He talked about a tire deal, Your Honor, and he also, as I understand cases, it's not a completely narrow corridor between a specific date or at a specific time he must have been operating as a promoter type man. It's rather an overall operation which can cover not only—

The Court: I think you are mistaken about that. I think it has to be an overall operation for him to succeed. The fact he isn't in that business the year he takes the loss, I think the cases hold it to be regarded as part of his business. We have got so far from the question now I can't remember what it was.

Mr. Schleider: I asked him—he had testified he took these deals to Mr. Whipple, various and sundry deals, and I think he did testify he did.

The Court: I don't think you can say it is immaterial provided it was before the last year we've got.

By Mr. Schleider:

Q. Prior to 1953, and I am referring to prior to December 31, 1953, the deals that you took to Mr. Whipple, were they taken to Mr. Whipple with the idea of getting him to contribute his services in putting the deals together?

A. There is no question about that. "Whip" is a cracking good money-raiser. That is the reason I took the deals to him, to join me and help promote the deals.

Q. You didn't take them to him solely as an investor?

A. He didn't have that kind of money.

[fol. 94] Mr. Schleider: I believe that's all.

Mr. Bergeron: No questions.

The Court: Thank you, Mr. Head.

(Witness excused.)

Mr. Schleider: If nobody has any objection, Mr. Head can be excused if it is agreeable with the Court and Mr. Bergeron.

Mr. Bergeron: No objection, Your Honor.

The Court: Very well.

Mr. Schleider: Your Honor, I anticipate that starting with Mr. Whipple will probably take us an hour or an hour and a half. If the Court wants to complete him this afternoon, we will go ahead.

The Court: Is it either or can we go ahead for maybe half or three-quarters of an hour and pick him up again in the morning?

Mr. Schleider: We could; if the Court had no objection I would prefer to put him on so we could hear his full testimony at one time. But I guess there is no objection—

[fol. 95] The Court: An hour wouldn't bother me, but when you say an hour and a half, it may be two hours and—

Mr. Schleider: I am anticipating there will be considerable cross examination too?

The Court: Are you talking about cross examination too?

Mr. Schleider: I am talking about in addition to direct.

The Court: How about putting him on direct?

Mr. Schleider: I am anticipating that would be an hour or an hour and a half on direct.

The Court: I would prefer you to put him on.

Mr. Schleider: I am reluctant to start in the middle there. I lose my continuity.

The Court: I don't want to assure you I will sit an hour later until you get through.

Mr. Schleider: Could I just do this, put on Mr. Daniels, the accountant, for about fifteen minutes in connection with these records. I did want to get an explanation from him [fol. 96] which is consistent with our stipulation and I think that will bring us about fifteen or twenty minutes down the road. I don't think—

The Court: Well, I have a lot of work here, Mr. Schleider, and I would like to sit until somewhere around a quarter of 5:00 or 5:00 o'clock.

Mr. Schleider: Well, I will put Mr. Daniels on and if there is time left, we will put on as much as we can.

The Court: All right. Unless you want to put Mr. Whipple on and hope you can complete it.

Edwin C. Daniels was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Will you have a seat, sir, and state your name and address for the record, sir.

The Witness: My name is Edwin C. Daniels; my home address is 75 Hibury, Houston, Texas.

Direct examination.

By Mr. Schleider:

Q. Mr. Daniels, what is your occupation?

A. I am an accountant with the firm of Ernst & Ernst.

Q. Are you a certified public accountant?

[fol. 97] A. Yes, sir.

Q. And are you licensed by the State of Texas?

A. Yes, sir.

Q. Your license is in good standing.

A. I hope so.

Q. So far as you know?

A. So far as I know it's in good standing.

Q. You have a degree in business or in accounting from an accredited university?

A. Yes, sir.

Q. Where did you graduate and when?

A. Well, I graduated from Millsaps College in Jackson, Mississippi in '52—in '42 with a B.A. degree, majored in economics and took graduate degree from the University of Houston and received my Master's Degree there.

Q. Has all your education in the college been in the field of accounting?

A. Yes.

Q. How long have you been a certified public accountant?

A. Since 1950 or 1951.

Q. And prior to that time how long have you been engaged in the accounting profession?

A. Well, prior to that time, of course in 1942 I finished school and was called into the service and got out in '46 and from '46 to 1948 I was going to the University of Houston taking graduate work; and in 1948 I went to work in the accounting as such, and since that time I have been in the accounting business.

Q. Have you been with just that firm of Ernst & Ernst?

A. No, I was in another business before that time.

Q. You were in the accounting department though?

A. Yes.

[fol. 98] Q. I requested that you prepare, in the interest of time, certain excerpts and schedules from the books of A. J. Whipple and Mission Orange, is that not right?

A. Right.

Q. And I will show you now exhibit of Petitioner No. 21, consisting of some thirteen-odd pages, and you tell me if that is the summary you prepared?

A. Yes, that is the summary I prepared.

Q. I want you to go through that summary very briefly, page by page, and as briefly as possible tell me the function of the particular schedule on page 1, for example.

A. Well, may I say something introductory to that that might be some explanation?

Q. Yes, sir.

A. I think the point to be determined was that these advances Mr. Whipple had made to Mission Orange Company were actually received by Mission Orange Company, deposited in their bank account and used to pay subsequent bills with that.

In order to establish that, we looked at the records of Mission Orange Bottling Company and traced these advances which he had made into their cash account and into the bank statement and into the cash disbursements book to determine the disposition that had been made.

On page one, for instance, is the advance made October 29, 1951, in the amount of $5,000; and that was received by Mission on October 29, 1951.

Now, at the time of the advance, the balance in the bank account of First National Bank of Lubbock, which was the depository for the Mission Orange Bottling Company, showed an overdraft of $1,279.31. The sales and collections during the month of October, 1951, exclusive of the advance, amounted to $17,301.69, making a total available cash then to pay bills of $16,022.38.

[fol. 99] The disbursements made during the month of October, 1951 were as follows:

Trade notes and accounts, $18,129.98.

And the payroll shown by their payroll journal, $3,660.12; a total of $21,790.10, leaving a cash overdraft before the advance of $5,767.72.

The advance came in of $5,000 and left an overdraft at the end of October, 1951 of $767.72.

Now, from the cash disbursements books, I listed the payments which had been made in the amount of two hundred or over in order to reduce the quantity of the items, because there were a number of small items of ten and fifteen dollars.

Q. These were disbursements by whom?

A. Mission Orange.

Q. That is what page one deals with in the main, is what, cash received by Mission Orange?

A. And cash disbursed by Mission Orange.

Q. You also show on that the condition of the bank account at the time the disbursements or deposits were made?

A. Right.

Q. All right.

Now,—

A. Shall I—

Q. I don't think it's necessary for you to go down each item there because the exhibit speaks for itself. But I wanted you to give an explanation.

A. That was to determine the advances had been received by Mission Orange and the money did go to Mission Orange's bank account and Mission Orange did pay for the operation of Mission Orange Bottling Company.

Q. What does your next page reflect, page two of Exhibit 21?

[fol. 100] A. Page two shows an advance of $4,000 that was made to Mission and received by Mission on January 23, 1952, which advance went into Mission's bank account in the First National Bank at Lubbock, and that, preliminary to the advance, the cash account in the bank showed an overdraft of $3,661.60, and with the cash advance brought them with a balance January 31, 1952 of $338.04.

Q. Now, you have talked on page one and you are starting out on page two of Exhibit 21, Petitioner's Exhibit, and you have referred to advances. What do you have reference to when you use the word "advance"?

A. Well, a check drawn by Mr. Whipple payable to Mission Orange Bottling Company, check on Mr. Whipple's personal account in Houston, Texas payable to Mission Orange Bottling Company at Lubbock.

Q. What I am getting at is you refer to advances by Mr. Whipple, is that right?

A. Right.

Q. All right, sir.

A. These are all, all these sheets show the different advances he made during that period of time, and the fact Mission did get the money and did spend it.

Q. All right, sir.

Now, did you prepare any summaries in connection with those exhibits there or just the detail sheets?

A. Well now, the summary sheets I think you already have. They are not part of these. Those were prepared for the examining agent.

Q. I show you Joint Exhibit 9-I and ask you if you prepared that Exhibit 9-I?

A. Yes, sir, I prepared Exhibit 9-I.

Q. And what is Exhibit 9-I?

A. Well, Exhibit 9-I is captioned: "Summary of Account Due from Mission Orange Bottling Company, A. J. and [fol. 104] Mildred Whipple, period from July 1, 1951 to December 31, 1953," and the first sheet is a summary of it and shows the nature of the advances to Mission Orange Bottling Company and the amount of payments which Mission made to Whipple, and then the net amount of the loss incurred by him of $56,975.10.

Q. Well now, what else does your summary show—I am referring now to Exhibit 9-I, Joint Exhibit, as per the stipulation, on the second page, for example, it has more than one page, doesn't it?

A. Well, for instance, let's read the caption on the first page, and behind it are the details underlying the first page.

Q. All right.

A. Sale of assets, of net assets to corporation, Mission Orange Bottling Company of Lubbock. Now, that was the sale by Mr. A. J. Whipple of the Mission Orange at the time it was a proprietorship, to Mission Orange Bottling Company, a corporation, in June of 1951.

And the net assets of the proprietorship, Mission Orange, were $25,502.50. That is the first item.

Q. Is that June or July of 1951?

A. Well, June 30, 1951 was the actual closing entry on Mr. Whipple's records and July 1, 1951 is the date of the opening entry of Mission Orange Bottle Company, the corporation records.

Q. As far as you are concerned, Mission Orange Bottling Company, Inc., a corporation commenced business on July 1, 1951?

A. That's correct.

Q. All right.

A. And the second item, cash advanced since date of incorporation, as shown by schedule, $103,300—even.

And I have on page 2 then a listing of the advances made by Mr. Whipple to Mission Orange Bottling Company, the [fol. 102] date of those advances, the check number, and the purpose of the advance, and the amount advanced, all of which adds up to $103,300.

Q. That was the total amount of money Mr. Whipple had advanced to Mission Orange, is that right?

A. That's right, plus expenses paid by Mr. Whipple for the account of company in the amount of $2,975.76. These are expenses which were actual Mission Orange Bottling Company of Lubbock, Inc. expenses which he paid out of his own pocket and charged to them, totaling up $2,975.76, $25,502.50, plus $103,300 even, and the total is $131,778.26.

Now, less payments to A. J. Whipple by the corporation, as shown by schedule, $74,803.16, the net result, of course, is the total of $56,975.10.

On page 3 of this exhibit are the repayments which were made to Mr. Whipple by Mission Orange.

Q. The $56,975.10 represents what now?

A. That represents the excess of the advances which he had made over and above the repayments which Mission made to him.

Q. Now, is that carried on Mission's books as a receivable to A. J. Whipple or rather payable?

A. It's a payable.

Q. Is that shown on Mission Orange books as a debt to A. J. Whipple?

A. Yes, yes.

Q. On your Exhibit 9-I, if you will let me refer to that a moment, please, sir, there is some cash advances here, and I notice that one of them is dated August 22, 1952, which is an advance to which I now indicate.

Can you tell me by whom that advance or rather, how that advance was made?

A. Well, that particular advance you are talking about—let me read it; it shows paid to A. J. Whipple Construction Company. The date is August 22, check numbers none. [fol. 103] Purpose of the advance—advance made by A. J. Whipple Construction No. 2 to Mission Orange for account of A. J. Whipple, personal, $10,500.

Well, in going into Mission's records and into Mr. Whipple's records, it was found this $10,500 consisted of three separate advances which A. J. Whipple Construction had made to Mission for Mr. Whipple's account, and they charged it to him on their records and he picked it up on his records as a liability to A. J. Whipple Construction Company, and a receivable from Mission Orange Bottling Company. Mission Orange Bottling Company recognized it as a debt owing to A. J. Whipple.

Now, those three items—I will have to refer to the detail on it. One was for $5,000 and one was for $4,000 and one was for $1,500, as I recall it. But they were separate advances made in 1951, October 29, 1951, for $5,000, and January 23, 1952 of $4,000, and February 4, 1952 of $1500. total $10,500.

Q. Were there any similar advances on Exhibit 9-I that were made in the same manner?

A. Well, yes. You have one other one there to D. M. Dozier which was a payment to D. M. Dozier on February 4, and it was really a reimbursement to Mr. Dozier by Mr. Whipple for $1,250, such sum having been advanced by Mr. Dozier to Mission Orange for Mr. Whipple's account.

Q. But in every instance Mr. Whipple, himself—

A. And there is another item there which is a direct payment to the First National Bank at Lubbock, October 4, 1952, check 450, which was in payment of a note for the account of Mission due the First National Bank of Lubbock for $4,050.

Q. Mr. Daniels, do you have any summary as such, a composite summary that shows the method or manner in which Mission Orange used these funds, that is; what were [fol. 104] they used to pay, in the main, the funds that A. J. Whipple advanced?

A. Well, what they used were used to pay—I think they are shown on Exhibit 21, page 1. Each page of the exhibit shows they were paying Kimbell-Lubbock for sugar that went into the drinks; Al W. Townsend for truck expense; and Mallory's Laundry & Uniforms. That's what they were using the money for. Here is one payable to the First National Bank for a note of Mission Orange.

Q. Now, turn to the December 31, 1952 sheet. Do you have one for that particular—

A. December 31, 1952?

Q. Yes, sir. Or 1953, I should say.

A. 1953?

Q. Yes, sir. Could you briefly cover that?

A. The disbursements that were made?

Q. Yes.

A. There again, the disbursements were made to the—shall I list the names of the vendors that were being paid?

Q. Just briefly give us an example.

A. Kimbell-Lubbock for supplying the sugar. Merchants East Freight. Here is one $18,991.42 to the bank in payment of Mission's note.

Here is one to Mason & Mason for concentrate. And KUEB for T V Advertising. Parker Brown Company in the amount of $2,421.40 for CO2 Gas.

Here is one to Owens Glass Company for $2,939.82 for bottles, and so on. I mean—

Q. Those are typical of the type of expenditures?

A. Spent in excess of $200, $48,768.71 for expenditures.

Q. In your schedule, which is 9-I, I may have interrupted you a little early on this. You were talking about advances [fol. 105] by the construction company No. 2 and advance by Dozier for the account of Whipple, personally.

A. Yes.

Q. In each instance, I think there was one other—

A. There was one Buckner Equipment Company.

Q. In each instance, A. J. Whipple, personally, was ultimately, by bookkeeping transactions, charged and paid the advance, is that right?

A. Yes, he had to stand the advance.

Q. Now then, in connection with the—you've got here on the first page of Exhibit 9-I some payments by A. J. Whipple or to A. J. Whipple by the corporation, and you list a total of $74,803.16.

A. Yes.

Q. How did that principally come about?

A. How did that what?

Q. I say how did that $74,803.16 principally, that credit of $74,000 on the books of A. J. Whipple—

A. Well, the two principal items, if that is what you

want, consisted of one item, December 31, 1953, of $67,332.91 which was the equipment of Mission Orange which he took title to, which they sold to him. He bought it for $67,332.91 as partial satisfaction of the amount which they owed him.

Q. Mission Orange owed Whipple?

A. Right. And the other item is an automobile which he bought in partial satisfaction, $3,081.75, in partial satisfaction of the amount they owed him.

Q. Any cash payments on these advances by Mission Orrange to A. J. Whipple?

A. Yes.

Q. What did they total, if any?

A. I don't have a separate total of those, but I can give it to you.

Q. Give me the approximate amount.

A. $4,500.

[fol. 106] Q. That was the total cash Mission Orange at any time paid Whipple?

A. Yes, sir.

Q. What kind of equipment did Mission Orange transfer to A. J. Whipple, and about when did that occur?

A. Well, it occurred in December, 1953, and the type of equipment was the bottling equipment which they had in their plant there. They had no other assets. They had no cash. The receivables were very low, if any, so the only asset they had of any value was the bottling equipment; so he just took title to the bottling equipment.

Mr. Schleider: I have no further questions.

Cross examination.

By Mr. Bergeron:

Q. Those figures in Exhibit 9-I and the summary sheets, Exhibit 21, where were they taken from, what were they taken from?

A. The figures in Exhibit 9-I, is that the—may I have them back?

Q. That summary you were looking at.

Mr. Schleider: I think the record reflects our stipulation is that it was taken from the books of the corporation, Mission Orange, and also from A. J. Whipple.

Mr. Bergeron: Yes.

The Witness: Let me have that.

[fol. 107] By Mr. Bergeron:

Q. You prepared that?

A. The figures in this 9-I, which is the summary of the advances Mr. Whipple made to Mission Orange, the source of this information were the records of Mr. Whipple.

Q. Not the corporation?

A. We then, in turn, traced these entries into the corporation's records.

Q. You were engaged by Mr. Whipple to go and make an examination of that corporation known as Mission Orange, were you not?

A. We were not engaged in making an examination of Mission Orange.

Q. What were you engaged to do?

A. I don't understand.

Q. According to this schedule, advances by A. J. Whipple for account of Mission Orange Bottling Company, there was a payment on August 4, 1953 to Ernst & Ernst. That is your company, is it not?

A. That's right.

Q. Auditing service, $1,503.68.

A. That was a separate engagement though; in 1953, Mr. Whipple called us and said he had a suspicion that there may have been a defalcation at Mission Orange Plant in Lubbock and would we send some of our men up there to check out the defalcation. The $1,503.68 you are referring to, auditing service, was for that specific purpose in checking out and determining the amount of the defalcation.

What I am driving at is that the total of the advances here, the examination which was made for which he paid the $1,503.68, was separate and apart from the preparation of this particular schedule.

[fol. 108] Q. Then you are answering my question that you were the firm of—you were, the firm of Ernst & Ernst were engaged to check Mission Orange, isn't that true?

A. A specific examination of this defalcation.

Q. I didn't ask you if it's specific or otherwise. You did check?

A. Right.

Q. Your figures on this schedule are as of the date December 31, 1953.

A. Right.

Q. Was the corporation still in existence after that date?

Mr. Schleider: I object to that, Your Honor.

Mr. Bergeron: It's part of the picture.

Mr. Schleider: No, it is not.

In this case we have stipulated that the debt was worthless in 1953; that was a debt in the amount of $56,975.10. And I don't think any reference to what happened thereafter is material.

The Court: Why would it be material, Mr. Bergeron?

Mr. Bergeron: To show that the company was still in existence.

The Court: Well, that is what you asked about.

[fol. 109] Mr. Bergeron: Yes.

The Court: Why is that material?

Mr. Bergeron: To give the entire picture of the transaction, to see whether Mr. Whipple had abandoned that corporation as of December '53.

The Court: Why would that make any difference?

Mr. Bergeron: It may for the purpose of my argument.

The Court: For the purpose of showing what?

Mr. Bergeron: Showing that it is a continuing company.

The Court: Why is it material whether the company is continuing or not, if the debt is worthless?

Mr. Bergeron: On the theory that he was till putting money in the corporation after that date.

The Court: Which contradicts the stipulation that—proving that it wasn't worthless.

[fol. 110] Mr. Bergeron: I want to show that they continued to put money into that corporation after December 31, 1953.

The Court: Well, there is only one purpose in showing that, isn't there? And that is that it wouldn't be considered worthless?

Mr. Bergeron: No. I say in determining whether the business was continuing.

Mr. Schleider: I fail to see that. That is the big thrashing on this whole stipulation. We thought we had that horse buried the other day, because the stipulation specifically provides, and I am quoting in part:

"That either party may introduce other and further evidence not inconsistent with the facts herein.

"No. 8—"page four of the stipulation: "Mission Orange Bottling Company—"

Mr. Bergeron: The existence of the corporation after December 31, 1953 would not be inconsistent with the fact we have—with the facts we have stipulated.

The Court: It would not be. Let's assume it wouldn't be. But then, it's immaterial.

Mr. Bergeron: It would have a bearing in my argument in the brief.

[fol. 111] The Court: You have to show me what it is, Mr. Bergeron. Up to now, I haven't been able to see.

I will sustain the objection.

By Mr. Bergeron:

Q. You stated that Mr. Whipple bought the equipment at book value on December 31, 1953. Is that true, in your testimony?

A. Yes. I don't recall the date of the bill of sale, but the entry on the books was December 31, 1953.

Q. And the term you used was that the equipment was bought by Mr. Whipple, is that right?

A. Yes.

Q. By "bought" do you mean a journal entry was entered in the books to show that this equipment to the tune of the $67,332.91, was transferred by journal entry to Mr. Whipple in part consideration of the advances which he had made, is that what you meant by it or do you mean that he paid cash on that date for that equipment?

A. Well, of course, the consideration which he paid had actually already been paid to the corporation in the form of these previous advances.

Q. But not for the equipment?

A. But in order to satisfy the debt to him of some $131,000, he, in turn, acquired this equipment here of some $67,000.

Q. And a journal entry to that effect—

A. To record the bill of sale and also to record the fact he had received that much of the obligation.

Q. That would be true also as to the automobile?

A. That's right.

Q. What is shown as book value on Exhibit 9-I?

A. Right.

[fol. 112] Q. Therefore, as of that date, there was no cash that passed hands between Mr. Whipple and Mission Orange for that particular equipment and automobile on that date.

A. Well, on December 15 he had advanced $48,000 and on this particular date he took title to the equipment.

Q. In other words, on December 31, there was—

A. No additional cash was passed on that date.

Q. You also stated that all of the equipment was bottling equipment. Is that true, on December 31, that was turned over to Mr. Whipple, is that true?

A. Well, Mr. Bergeron, I would have to see a copy of the bill of sale to itemize the equipment. It's equipment that goes into a bottling plant. I don't know you could confine it to a particular piece of equipment.

Q. I show you Exhibit 10-J which is a bill of sale dated December 15, 1953, to which is attached a list of equipment. Is that the equipment that changed hands on the journal entry, or do you know?

A. Yes. This is the equipment. I don't see anything on there that would not be bottling equipment.

Mr. Bergeron: No further questions.

Redirect examination.

By Mr. Schleider:

Q. Mr. Daniels, I want to correct what may be mostly a misimpression on my part or else I think there is an impression that is not entirely accurate from what you just testified.

As I understand, the schedule 9-I, Exhibit 9-I, $74,803.16 you say was represented in part by a transfer of equipment

[fol. 113] from Mission Orange, the corporation, to A. J. Whipple, the individual, in December 1953.

Is it your testimony that this transfer occurred on December 31 or on the date of the bill of sale?

A. The entry was not made on the books—I mean, we didn't make the entry on the bookkeeping until the end of the month. She made the entry at the end of December to record the sale of equipment from Mission Orange to Mr. Whipple, and the entry on the books was made on December 31.

Q. Now, do you know whether or not Mr. Whipple made any substantial advance on December 15, 1953?

A. Yes. He advanced $48,000.

Q. And if the bill of sale was dated December 15, 1953, would you have any reason to doubt that was not also the date of the transfer of the property from Mission Orange to Mr. Whipple?

A. No.

Q. Any delay from December 15 to December 31 would simply be occasioned by bookkeeping lag, is that right?

A. That is all.

Q. Or the closing entries?

A. That's right.

Q. So also, at the end of the month, would be a normal bookkeeping lag, is that right?

A. Yes.

Mr. Schleider: That's all.

Recross examination.

By Mr. Bergeron:

Q. And you prepared this Exhibit 9-I?

A. Yes.

[fol. 114] Q. That is your handiwork?

A. That's right.

Mr. Bergeron: That is all.

Mr. Schleider: I believe I have no further questions.

Mr. Bergeron: That is all, Your Honor.

The Court: All right.

(Witness excused.)

Mr. Bergeron: But I don't believe the witness should be excused.

Do you?

Mr. Schleider: Well, I won't excuse him. I mean, I won't until the Court excuses him. He will stay here.

Your Honor, could I start with Mr. Whipple in the morning?

The Court: I'd like to go ahead for awhile.

Mr. Schleider: All right.

Mr. Whipple.

[fol. 115] A. J. WHIPPLE, was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Will you have a seat, sir, and state your name and address, please.

The Witness: My name is A. J. Whipple; my address is 2707 Nottingham, Houston.

Direct examination.

By Mr. Schleider:

Q. Mr. Whipple, you are the Petitioner in this case, are you not?

A. Yes, sir.

Q. Your full name is Albert J. Whipple, is it not?

A. Yes, sir.

Q. And what is your wife's name?

A. Mildred Whipple.

Q. And you were married to Mrs. Whipple during the years 1952 and 1953, is that right?

A. Yes, sir.

Q. Mr. Whipple, when did you start business for yourself? When did you go into business for yourself?

A. 1941.

Q. Prior to 1941, what sort of work had you been doing?

A. I had been working as a construction superintendent and estimator for a lumber company, Stafford Lumber Company in Pasadena, Texas.

Q. Stafford Lumber Company in Pasadena, Texas?

A. Yes, sir.

[fol. 116] Q. All right, sir.

After you left Stafford Lumber Company, what did you do then?

A. Well, I was engaged in a building partnership with W. E. Brown in 1941 up to the early part of 1942.

Q. Were you engaged in that partnership with W. E. Brown at the time you were working with Stafford?

A. We were building houses more or less on the side, yes, sir.

Q. And after you left Stafford Lumber Company, I take it you and Mr. Brown went together on a full-time basis?

A. Yes, sir.

Q. Now, how long did you and W. E. Brown build together?

A. About a year.

Q. Did you operate as a partnership or a corporation or—

A. Partnership.

Q. Did you have a name for your partnership?

A. I believe that at that time we operated all in W. E. Brown's name due to the fact we had started that while I was with Stafford Lumber Company, and I received part of the profits.

Q. All right, sir.

You state you stayed with W. E. Brown about a year?

A. Yes, sir.

Q. Was that a fifty-fifty basis?

A. Yes, sir.

Q. You had no corporation?

A. No, sir.

Q. All right, sir.

Now, after the end of a year, what did you do?

A. Well, before I left Brown, Miles Strickland had approached me to build a 608 housing project in Greens Bayou for which I was to receive twenty-four per cent of the stock [fol. 117] of the corporation and also a percentage of the profits for building the houses, which were built in a partnership with Miles Strickland, W. C. Perkins and myself, of which I had twenty-four per cent interest in the partnership; Mr. Perkins twenty-five, and Strickland fifty one.

Q. Under what name did you operate?

A. S.W.P. Construction Company.

Q. I take it that stood for Strickland, Whipple, and Perkins?

A. Yes, sir.

Q. All right, sir.

Did you have any interest in any corporation or corporations about this time?

A. Well, Mr. Strickland had formed Industrial Homes, Inc., which was the company which was to own the 608 housing project; and I had the privilege of buying into that for a percentage of it, which eventually was thirty-three per cent.

Q. Did you subsequently buy into it?

A. Yes, sir.

Q. Into the corporation.

That was Industrial Homes, that was the name of that corporation?

A. Industrial Homes, Inc.

Q. All right, sir.

And that was formed about what year?

A. 1942.

Q. All right, sir.

And how long did you have an interest in Industrial Homes?

A. Until 1951.

Q. All right, sir.

Now, between 1942 and 1951, did you have an interest in any other corporations other than Industrial Homes?

[fol. 118] A. Well, the latter part of 1943 we formed a Harbor Homes, Inc., and we took over and finished 63 housing units in Meadwood Estates. That was a job started by Miller Estes Company out of Oklahoma City, and they went bankrupt, and it was taken over by Guardian Trust Company, a bonding company out of Detroit, which we made a trade and completed, bought the property from the bank and completed it. And Harbor Homes, Inc., in turn, completed the houses and sold them on contract and finally got rid of the houses.

Q. What interest, if any, did you have in Harbor Homes?

A. 40 per cent.

Q. You had 40 per cent of the stock?

A. Not in the beginning. I bought in for 40 per cent.

Q. And did you have any—were you employed by Harbor Homes initially?

A. No, sir, because we didn't draw any money out of it until it was completed. We had Industrial Homes completed, and the salary that I got at that time came from that corporation.

Q. That is, from Harbor Homes?

A. From Industrial Homes.

Q. From Industrial Homes?

A. Yes, sir.

Q. Now, how long did Harbor Homes, Inc. stay in business?

A. I think it's still in existence. I was out of it in 1951.

Q. Now, in 1943, you say you formed Harbor Homes, Inc. Did you form any other corporations in 1943?

A. Well, over a period of nine years, Mr. Strickland and I had Industrial Homes, Inc., Harbor Homes, Inc., S & W Construction Company, a partnership; S & W Construction Company, Inc., a corporation; Evergreen Rice Company, a partnership; Richmond Plaza, Inc.: Air Line Lum-[fol. 119] ber and Supply Company, Ltd.; and Air Line Lumber and Supply Company, Inc.; and Shakertown Distributors, which was a partnership.

Q. How do you spell that?

A. S-h-a-k-e-r-t-o-w-n.

Q. All one word?

A. Yes, sir.

Q. Shakertown what?

A. Shakertown Distributors which, if I am correct, was a partnership.

We had 29th and Air Line, Inc.

Q. 29th and Air Line?

A. Yes, Inc., which was a corporation that owned the property where Air Line Lumber was.

Q. It owned the real estate?

A. It was a real estate and building holder.

Q. Who were the tenants?

A. Air Line Lumber and Supply Company and Shakertown Distributors were both tenants. We also had Gulf

Coast Plumbing and Supply Company, which was a plumbing contracting firm.

Q. You had Gulf Coast Supply Company?

A. Gulf Coast Plumbing and Supply Company.

Q. That was a partnership?

A. That was a plumbing contractor.

Q. Was that a partnership or a corporation?

A. I believe it was a partnership. I am not positive. We had another partnership, State Tile Distributors.

Q. Do you remember when you formed that State Tile Distributors?

A. Either 1947 or 1948.

Q. How did you happen to form State Tile Distributors?

A. Well, for several years, a local tile contractor, by the name of Listi, had went after me to promote a wholesale tile company; and the proposition looked good, so I took [fol. 120] the proposition to Mr. Strickland and it looked good to him; and in the meantime, we took his brother, Bentley Strickland and formed a four-way partnership; and Bentley Strickland eventually took over the management of it. And after the death of Mr. Listi it had to be reorganized, and so it was a three-way partnership.

Q. How did you happen to come to form this State Tile Distributors, or State manufacturing concern?

A. We were buying tile from Indiana—

Q. Yes.

A. And it was during the time tile was allocated and hard to buy. We decided if we controlled our source of supply, it would be a good operation. So we took a trip and went to, first, to Cincinnati, Ohio and talked to one manufacturer and he wasn't interested. We next stopped at Anderson, Indiana; and after two days we made a deal with a sales manager by the name of Ellis for National Tile Company at Anderson, Indiana.

Q. How did you—what kind of deal did you make with him, how did you go about making a deal?

A. Well, we had an appointment with him one morning and tried to arrive at something. And finally, he wasn't too much interested, but we carried him to lunch, and after we had a few drinks and a little lunch and did a little more talking, we offered to buy so many seconds and so many

firsts, and finally it got interesting to him and we offered to let him draw a draft on us for four carloads of tile, which was about $50,000, and he became more interested. And the next morning, we had three cars of tile rolling and he didn't want to sell us any when we first went there.

Q. You kinda talked him into it?

A. We tried.

Q. At the time you were up there in Indiana, had State Tile Distributors actually been formed?

[fol. 121] A. We didn't have a name while we were up there looking for a deal; we formed the name for it while we were eating lunch. And after that, the next day they had checked our bank credit of—I think they checked S & W Construction Company or Air Line Lumber, and I told them to draw a draft on S & W Construction Company.

Q. And they would send the merchandise on down to Houston?

A. That's right, yes, sir.

Q. Let's go back just a minute.

I noticed that you talked about S.W.P. Construction Company. That was when Mr. Perkins was involved?

A. That was a partnership.

Q. Now, Perkins, I take it, withdrew from that partnership, is that right?

A. Yes, sir.

Q. And is that what came to be known as S & W Construction Company?

A. Eventually we did have S & W Construction Company.

Q. Was S & W Construction Company a partnership or a corporation?

A. We had both on S & W.

We also had a Whipple & Strickland, and Whipple Construction Company, Inc.

Q. Did you own an interest in all those ventures, the partnerships you described and the corporations too?

A. Yes, sir. After the first two, of Industrial Homes and Harbor Homes, with the exception of three 608 apartment projects, which I failed to tell you about, I had an equal interest with Mr. Strickland in all of them.

[fol. 122] Q. That is all these corporations, Richmond Plaza, Air Line Lumber and Supply Company, Inc., and 29th and Air Line, Inc?

A. Yes, sir.

Q. And any other corporations that subsequently followed, is that right?

A. Yes, sir.

Q. Now, you mentioned something here about Evergreen Rice Company being a partnership. What was Evergreen Rice Company?

A. That was a partnership we formed when we were building—I believe it was forty-three houses on the corner of Evergreen and Rice on a ten-acre tract of land in the city of Bellaire.

Q. And that was a partnership with you and Strickland?

A. With me and Strickland.

Q. Any other partnerships involved in that—or rather, any other partners involved in that partnership?

A. No, sir.

Q. All right, sir.

Now, what was Shakertown Distributors?

A. That was a company formed to distribute shingles and also it had John W. Anderson in it. John W. Anderson was the third person in Air Line Lumber and Supply Company.

Q. Well, now, you have also got here an Air Line Lumber and Supply, Ltd. and Air Line Lumber and Supply Company, Inc. What is the difference?

A. Air Line Lumber and Supply Company, Ltd. is our first venture there due to the fact Mr. Strickland wanted to limit his liabilities when we first went into the buliding material business.

Mr. Anderson—I originally owned the land where Air Line Lumber and Supply Company is located, and held [fol. 123] title to the land about seven years after it was started.

Mr. Strickland, to start with, wanted to limit his liability and we had a limited partnership which eventually was turned into a corporation.

Q. In other words, Air Line Lumber and Supply Company, Inc. is the successor of Air Line Lumber and Supply Company, Ltd., is that right?

A. Right.

Q. But the limited partnership was limited as to the liability of Mr. Strickland?

A. Yes, sir.

Q. Who were the general partners in Air Line Lumber and Supply Company, Ltd.

A. Myself and John W. Anderson.

Q. Now, how did you happen to come to form that Air Line Lumber and Supply Company, Ltd.? Was that at the instance of Mr. Strickland or—

A. Well, I had bought this property with the intention of building in a building materials yard; and Mr. Strickland wasn't interested in going into that business or didn't seem so at that time. So there was quite a bit of red tape to go through all the dffierent agencies to get a permit to go into the building business with everything still allocated.

Knowing I wanted to keep from being tied down, I took John W. Anderson in as a full partner, and was going to give him fifty per cent of the lumber business to run it.

After Strickland found out I was serious and really going into the lumber business, he wanted a part of it. And then I asked Anderson if he minded a third party being in it. I had told Strickland I had to get permission. And when he said he would go along that way, we formed it and split it three ways.

[fol. 124] Q. As best as you recall, about when was Air Line Lumber and Supply Company, Ltd., formed?

A. We unloaded the first load of lumber that went in on July 4, 1945.

Q. Does that date have some significance to you?

A. Yes, sir, because I unloaded it, myself.

Q. All right, sir.

When did you form S & W Construction Company, Inc.?

A. I presume that was formed about '43 or '44. I don't recall.

Q. All right, sir.

Then you say that Air Line Lumber and Supply Company was a successor to Air Line Lumber and Supply Company, Ltd.?

A. Yes, sir.

Q. When was the corporation formed, do you have any recollection?

A. Of what now, sir?

Q. When was Air Line Lumber and Supply Company, Inc. formed?

A. I would say about 1949, about four or five years after we formed the partnership.

Q. In other words, you operated the limited partnership, Air Line Lumber and Supply Company, Ltd., a period of some four or five years and then formed the corporation which bore the same name?

A. After that, we had enough money to form a corporation with enough capital to operate. To start with, we didn't have any money at all.

Q. How did you get your financing?

A. Well, in the beginning of Air Line Lumber and Supply Company, Ltd., Mr. Strickland and I advanced money out of partnerships, like, S & W Construction and Evergreen Rice Company.

[fol. 125] Q. Did you generally make necessary advances to these corporations as you formed them pretty much as a general plan or scheme in their operation?

A. Well, when you form a thousand dollar corporation, you don't borrow any construction money from the bank; you have to get it from somewhere. We had these partnerships which we had from the beginning. We would take this money and advance it to the various corporations as construction money.

Q. Then I take it you would be paid—

A. When the job was completed and it would go back into the partnership.

Q. Was that a general method that you used in forming all these corporations?

A. We did for a period of about ten years.

Q. Well, now, how long did State Tile Distributors stay in existence?

A. It's still in existence.

Q. Did you have any interest in State Tile Distributors?

A. I sold my interest in 1951.

Q. What about Shakertown Distributors, you say that is a partnership?

A. Yes.

Q. About when was that formed?

A. About 1948.

Q. And what was Shakertown Distributors engaged in, what sort of activity?

A. They were wholesale distributors for a brand of cedar shakes made on the West Coast.

Q. What did you do, just sell these shakes?

A. We bought them and sold them wholesale to dealers in the Houston area.

Q. You sold them to people who were in the market, retail market for cedar shakes?

[fol. 126] A. Most of them were sold to retailers for resale; it was a jobbing deal.

Q. It wasn't part of your construction operations though, was it?

A. No, it wasn't even part of the lumber company. It was a separate operation and separate office.

Q. Well now, who did Shakertown Distributors rent their offices from?

A. 29th and Air Line, Inc., the holding company that owned the property.

Q. And Air Line Lumber and Supply Company, Inc. also rented from them?

A. They rented from 29th and Air Line, Inc.

Q. And you had an interest in 29th and Air Line, did you not?

A. Yes, sir.

Q. How long did the partnership known as Evergreen Rice Company stay in existence?

A. I would say from about 1945 until 1951.

Q. I noticed that in a number of these instances, and in practically every one of these, you listed here, you indicate that your interest in the various ventures with Mr. Strickland terminated about 1951; is that correct?

A. We had a meeting of the minds the latter part of 1950 and reached our final settlement the first six months in 1951.

Q. And what, in the way of settling your affairs with Mr. Strickland, what were generally the mechanics of the settlement?

A. Well, he bought every corporation that we had—I think this what you are asking me—every corporation that we had, he bought my interest at book value. Is that what you mean?

Q. In other words, Mr. Strickland bought you out?

A. Mr. Strickland bought me out right down the line. I didn't retain any property or any corporations.

[fol. 127] Q. Did that apply to all these partnership ventures?

A. Everything we had together was liquidated.

Q. On the date of liquidation in 1951, at the time you sold to Mr. Strickland, I am going down this list and you tell me whether or not you had an interest at that time in these various ventures.

Did you have an interest in Industrial Homes, Inc.?

A. Thirty three and a third per cent.

Q. That was in 1951?

A. Yes, sir.

Q. Did you have an interest at that time in Harbor Homes, Inc?

A. Forty per cent.

Q. And did you have an interest in S & W, the partnership?

A. Yes, sir.

Q. Did you have an interest in S & W Construction, Inc., Construction Company, Inc.?

A. Yes, sir.

Q. Did you have an interest at that time in Evergreen Rice Company, partnership?

A. Yes, sir.

Q. What about Richmond Plaza, Inc.

A. Yes, sir.

Q. You had an interest?

A. I had an interest in Evergreen; I had an interest in everyone.

Q. And Air Line Lumber and Supply Company, Inc.?

A. Yes, sir.

Q. Incidentally, that limited partnership terminated when you formed the corporation?

A. When we formed the Air Line Lumber and Supply Company, Inc.

Q. What about Shakertown Distributors, a partnership?

A. Yes, sir.

[fol. 128] Q. And what about 29th and Air Line, Inc.?

A. Yes, sir.

Q. You had an interest in that?

A. Yes, sir.

Q. Mr. Strickland bought that in 1951?

A. Yes, sir.

Q. And what about Gulf Coast Plumbing and Supply Company?

A. That final return—it only operated two years; it was a bad venture and it was losing money. I believe it folded in '49.

Q. I take it from that, it started about 1947 then?

A. Yes, sir.

Q. All right, sir.

Did you personally have any money in Gulf Coast Plumbing and Supply Company?

A. I don't recall.

Q. Did you have an interest as a partner in that company?

A. I evidently did. It showed on my tax return one year, but I don't remember that. But I do know there was such a company.

Q. How about State Tile Distributors, did you—

A. I sold that in 1951.

Q. All of the interest you have enumerated here you sold to Mr. Strickland in 1951, is that right?

A. Yes, sir.

Q. After you sold your interest, what did you do then?

A. Well, I bought property on Bissonnet and formed Whipple Lumber Company; also bought land at Angleton and started back in the construction business.

I bought a restaurant on Fannin Street in April, 1951; I bought a bottling plant in Lubbock. Later on in 1951 I bought some land in Bellaire. In 1951 I bought some land in Pasadena.

[fol. 129] We formed—we had a partnership, A. J. Whipple Construction Company, we had a building corporation, Dozier-Whipple Construction Company; we had another building corporation, Whipple Construction Company, Inc.; and another one, Angleton Homes, Inc.; another one by the name of Chevy Chase Development Corporation; another one by the name of Angleton Building and Holding Company; another partnership by the name of A. J. Whipple Construction Company No. 2. I believe that's all since 1951.

Mr. Schleider: Your Honor, I think this might be a good breaking point. I suggest to the Court because it opens up a new line of testimony.

The Court: I think that is a good idea, and perhaps you won't have too much trouble in finding your place tomorrow morning.

Mr. Schleider: Thank you very much.

The Court: We will take a recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:05 o'clock p.m., the hearing in the above-entitled matter was adjourned to Wednesday, April 22, 1959 at 10:00 o'clock a.m.)

* * * * * * *

[fol. 130] Proceedings.

The Clerk: Docket No. 65603, A. J. Whipple and Mildred Whipple.

The Court: Proceed with the case on hearing.

[fol. 131] A. J. WHIPPLE, resumed the stand and was examined and testified further as follows:

Direct examination (Continued).

By Mr. Schleider:

Q. Mr. Whipple, yesterday, shortly prior to the conclusion of yesterday's testimony, you were discussing some various enterprises in which you and Mr. Miles Strickland had been associated.

I am referring to Joint Exhibit 12-L, which is the income tax return of you and Mrs. Whipple for the year 1951.

And in connection with the capital gains schedule, I note a corporation listed as Federal Road Lumber Company, Inc. What was that corporation?

A. That was a retail building materials yard on Federal Road and Green Bayou.

Q. And did you have an interest in that corporation?

A. I owned one-third of it.

Q. And who owned the other interests?

A. Mr. Strickland and Mr. Anderson.

Q. They owned the other two-thirds?

A. Yes, sir.

Q. In similar proportion?

A. Yes, sir.

Q. I see on here also a Federal Road Building Corporation. What was that?

A. That was a construction company we used in building houses.

Q. And did you own an interest in that too?

A. Yes, sir.

Q. Was that a third?

A. No, sir. That was a half.

Q. You owned half of the stock in that corporation?

A Yes, sir.

[fol. 132] Q. Who owned the remaining half?

A. Mr. Strickland.

Q. Now, also listed down here is Commonwealth and California. What does that refer to?

A. That is a .608 apartment job, ten-year apartment house on the corner of Commonwealth and California.

Q. What was that? Was that a corporation?

A. A corporation.

Q. And you owned stock in that, did you?

A. (No response.)

Q. You have listed it here.

A. Evidently I did.

Q. You have listed a capital gain on the sale and disposition of that corporation.

A. Yes. We had two apartment houses out there.

Q. You owned, I take it, an interest in that corporation; is that right?

A. Yes, sir.

Q. How about Commonwealth and Missouri?

A. Yes, sir. That was another 608 apartment.

Q. When you say 608, what do you refer to?

A. Federal Housing Administration Title 608, Rental Apartments.

Q. I see.

There is also listed a Riverside Apartments Corporation on your—

A. That was another Federal 608.

Q. That was another corporation you had an interest in?

A. Yes, sir.

Q. I noticed also, and I don't think any of these you mentioned yesterday, a corporation, apparently, Dorwayne Construction Corporation, under your capital gains schedule, it indicates you acquired stock in that corporation on May 16, 1950 and disposed of it in 1951. What was Dorwayne Construction Corporation?

[fol. 133] A. It was a residential construction company.

Q. And who were the owners in there besides yourself?

A. Mr. Strickland and, if I am correct, Mrs. Bruce, who was Mr. Strickland's secretary, and myself.

Q. Now, I am not sure whether we covered this yesterday; but I see the corporation listed here also, Richmond Plaza, Inc. in which you purported owned an interest. What ownership did you have in that corporation?

A. If I am correct, forty seven per cent. I believe that is one we had a field superintendent with a six per cent interest in it.

Q. I see.

Well now, did you ever make any loans to any of these corporations that I have mentioned, for example, let's take the one I just talked about, Richmond Plaza, Inc. Did you ever make any loans to them?

A. Well, the parent companies and the partnerships.

Q. And through the partnerships you loaned them money?

A. No. The partnership would loan these corporations money.

Q. The partnership?

A. Evergreen-Rice, 29th and Air Line, Inc., S & W Construction Company. They were the holding company,

but the main partnership, why, Evergreen-Rice Company and S & W Construction Company.

Q. Did you in each of these corporations I have referred to here this morning, make one or more loans from the partnership to those corporations?

A. We were constantly lending money for construction purposes to all of them.

Q. And as I believe you testified to yesterday, when the construction job was completed, then that loan was paid to the particular partnership?

[fol. 134] A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. I am again referring, Mr. Whipple, to Exhibit 12-L, which is a joint exhibit attached to the stipulation of Petitioner's and Respondent, and refer to the schedule of income from interest.

Now, on this income from interest schedule attached to your return, Exhibit 12-L, you list in 1951 as having received interest from Whipple Lumber Company, Inc., Dozier-Whipple Construction Company—Dozier Whipple Construction Corp., rather, Whipple Construction Company, Inc., Angleton Homes, Inc., A. J. Whipple Construction Company, Whipple Equipment Company, Inc., and Durham-Clark Building Supply Company.

Now, with regard to the last one, what was Durham-Clark Building Supply Company? Was that a partnership?

A. That was a material partnership of which I had none of the—the only thing I did, I lent them money to operate on.

Q. You had no interest in the partnership?

A. No, sir.

Q. You owned none of the capital in the partnership?

A. No, sir.

Q. Now, what about A. J. Whipple Construction Company, what sort of a—

A. That was a construction partnership.

Q. That was not a corporation?

A. No, sir.

Q. And you did have an interest in that, I take it, from the name?

A. Beg your pardon?

Q. Did you have an interest in the A. J. Whipple Construction Company?

[fol. 135] A. Yes, sir.

Q. Do you recall who the partners were in the A. J. Whipple Construction Company?

A. V. L. Yarborough, L. R. Olive, G. A. Durham, and myself, I believe.

Q. Was Mr. Dozier a partnership—was Mr. Dozier a partner of Whipple Construction Company?

A. He was a partner of Whipple Construction No. 2, not of the original.

Q. Now then, these corporations—and they appear to be corporations from the listing here—did you have an interest, for example, in Whipple Lumber Company, Inc.

A. Me?

Q. Yes.

A. Yes, sir.

Q. You were a stockholder in the corporation?

A. Yes, sir.

Q. And how about Dozier-Whipple Construction Corporation?

A. Yes, sir.

Q. You owned an interest as a stockholder in that corporation?

A. Yes, sir.

Q. And Angleton Homes Corporation?

A. Yes, sir.

Q. You owned a stock interest in that corporation?

A. Yes, sir.

Q. And Whipple Equipment Company, Inc.?

A. Yes, sir.

Q. You were a stockholder there?

A. Yes, sir.

Q. Now, all of these corporations and partnerships that you have listed on the interest income schedule to your 1951 return, Exhibit 12-L, were for loans that you made [fol. 136] to those particular corporations and partnerships; is that right?

A. Yes, sir.

Q. And did you do that on just an isolated instance or was that done on more than one occasion?

A. Well, it was done on numerous occasions.

Q. What is Whipple Equipment Company, Inc.?

A. Whipple Equipment Company was a corporation formed to buy and lease equipment, trucks, construction equipment, such as, bulldozers, equipment of that kind.

Q. Well, by whom or by what was the equipment used?

A. The equipment was used by the various corporations that we had that needed that equipment, such as, lumber companies and construction companies.

Q. I see.

Well now, who was the principal user of or lessee of Whipple Equipment property.

A. A. J. Whipple.

Q. You, yourself?

A. Well, the corporations and the partnerships.

Q. I see.

Did Whipple Lumber Company, Inc. use any of that equipment?

A. They had at one time some six or seven trucks and two or three automobiles that belonged to the equipment company, under lease.

Q. Well now, did the various entities, partnerships or corporations using this equipment of Whipple Equipment Company, Inc., pay a rental on that equipment?

A. They paid a monthly rental based on the national rates. I don't know what they were.

Q. And did Whipple Equipment Company, Inc. have any other source of income or revenue except from the particular rental on equipment that they made?

[fol. 137] A. That is all.

Q. That was their sole source of business?

A. That's right.

Q. And sole source of revenue?

A. Right, sir.

Q. Where is Whipple Lumber Company, Inc. located?

A. 2436 Bissonnet, in Houston.

Q. Who owns those premises?

A. Sir?

Q. Who owns the premises?

A. I own the property and the buildings where it is.

Q. In other words, Whipple Lumber Company, Inc. is on a piece of land, real estate, with buildings and warehouses that you own, is that right?

A. Yes, sir.

Q. And you pay taxes on that, ad valorem taxes?

A. Yes, sir.

Q. Do you receive any rental for that particular piece of property?

A. Yes, sir.

Q. How long have you owned that property known as 2436 Bissonnet?

A. February 13, 1951.

Q. You acquired it February 13, 1951?

A. Yes, sir.

Q. I take it you acquired it then after you left Mr. Strickland?

A. Yes, sir.

Q. Did you acquire it for the purpose of doing business?

A. Yes, sir.

Q. And did you own 2436 Bissonnet in the years 1952 and 1953?

A. Yes, sir.

Q. You have owned them before and after those years, is that right?

[fol. 138] A. Yes, sir.

Q. And has rental been paid to you by Whipple Lumber Company—

Mr. Bergeron: I object to the question. The return speaks for itself and it shows renewal rental paid to Whipple and 12-L does not show any income from the Whipple Company or anybody else in the schedule.

The Court: I didn't understand the question as what the returns show, but what the facts are. If the facts develop rentals were received and weren't reported, then you know what you can do.

By Mr. Schleider:

Q. Mr. Whipple, included in your income for 1951 on which you paid taxes—

The Court: Well now, I am sorry to interrupt you. Wasn't there an answer?

Mr. Schleider: No. I didn't get the answer to that question.

Would you read the question, please.

(Question read.)

By Mr. Schleider:

Q. Would you answer the question?

A. Rental on the property at 2436 Bissonnet?

Q. Yes, sir.

A. Yes, sir.

[fol. 139] Q. And whenever you received that rental, you reported in your income tax return, is that right?

A. Yes, sir.

Q. All right.

Mr. Bergeron: I withdraw the objection, Your Honor.

By Mr. Schleider:

Q. Was this arrangement whereby you owned the property known as 2436 Bissonnet in any way similar to the 29th and Air Line arrangement with Air Line Building and Supply Company where they owned the land and rented it out to the lumber company?

A. Yes, sir.

Q. Did any of these other corporations listed in your return in which you received rental income—excuse me—interest income, occupy the premises known as 2436 Bissonnet?

For example, does Whipple Construction Company occupy 2436 Bissonnet? Was that the home office of it?

A. That is the home office of every corporation we had, sir.

Q. And did any of those corporations besides Whipple Lumber Company, Inc., pay rental to you, or was rental paid solely by the lumber company?

A. I don't recall any rent ever being paid by anyone other than Whipple Lumber Company.

Q. Mr. Whipple, I am now referring to Joint Exhibit 13-M, which is your tax return, your individual tax return for the calendar year ending December 31, 1952.

In connection with that particular tax return, I refer to your interest income schedule which indicates that you had interest income from A. J. Whipple Construction Company—now, that was a partnership, wasn't it?

[fol. 140] A. Yes, sir.

Q. You had it from Whipple Lumber Company, Inc.; that was your lumber company doing business at 2436 Bissonnet; is that right?

A. Yes, sir.

Q. And Durham-Clark Building Supply Company, the partnership.

A. Yes.

Q. And Whipple Equipment Company, Inc.?

A. Yes, sir.

Q. And also from Whipple Construction Company, Inc.?

A. Yes, sir.

Q. Now, what was Whipple Construction Company, Inc.?

A. Sir?

Q. What was Whipple Construction Company, Inc.?

A. That was a residential construction company.

Q. And what about Dozier-Whipple Construction Company?

A. That was the same thing, sir.

Q. Now, I see a new item here in which the Brag Club, Inc. paid you interest in the amount of $53.07. What was the Brag Club?

A. That was a private club in the 4400 block on Fannin Street up over a restaurant I owned.

Q. Did you own the Brag Club or—

A. That was a corporation. I couldn't own any stock in it, not any part of it.

Q. At the time you received this $53.07 interest from the Brag Club, you owned no interest in the corporation?

A. No, sir.

Q. You were strictly lending money to the company?

A. Yes, sir.

[fol. 141] Q. Well now, you say that you owned a restaurant that was beneath the Brag Club?

A. Yes, sir.
Q. What was the name of that restaurant?
A. Cousin's Restaurant.
Q. And when did you acquire that restaurant?
A. I believe in the latter part of 1951 or the first part of 1952. I believe it was the latter part of 1951.
Q. How long did you operate the restaurant?
A. Until May 31, 1953.
Q. Did you operate that as a corporation?
A. Operated it as an individual.

Mr. Schleider: Would you mark this for identification, please, sir.
The Clerk: Exhibit 22 for identification.

(Whereupon the document was marked for identification as Petitioner's Exhibit 22.)

By Mr. Schleider:

Q. Mr. Whipple, this is the Petitioner's Exhibit 22 which has been marked for identification by the clerk. What is that little article there?
A. It pertains to a restaurant in the 4000 Block on Fannin Street.
Q. And was that your restaurant?
A. That is the restaurant that I had, sir.
Q. What is that article from, Petitioner's Exhibit 22?
A. It's from the Houston Homebuilders Monthly Magazine.
Q. Where did I get this?
A. I don't recall where it came from.
[fol. 142] Q. Did you recognize that as part of your scrapbook by chance?
A. Oh, oh, yes. I believe it came out of it probably.

Mr. Schleider: We offer this, Petitioner's Exhibit 22. I understand Respondent has no objection.
Mr. Bergeron: No objection, Your Honor.
The Court: It will be received and marked in evidence.

(Whereupon the document marked Petitioner's Exhibit 22 for identification was received.)

By Mr. Schleider:

Q. Was Cousin's Restaurant known at any time by any thing other than Cousins.

A. It was originally Biil McKinney's. I mean, when it was first reopened. It was bought as a—the original operation of the restaurant folded, and I bought the equipment.

Q. Now, on the income from rents schedule to your 1952 tax return, Exhibit 13-M, you have listed a rent house, a commercial building in Lubbock. What does that have reference to, the rent house, first?

A. That house is located in Houston on Nottingham.

Q. And you were renting that house at the time, is that right?

A. At that time.

Q. What about the commercial building in Lubbock, what does that have reference to?

[fol. 143] A. That is the building that houses Mission Orange Bottling Company.

Q. In addition to that, I also notice a rental income listed on your 1952 income tax return that describes a building and warehouses, Houston. What particular installation does that have reference to?

A. Well, the Houston property is at 2436 Bissonnet where the Whipple Lumber Company is.

Q. In other words, that has reference to your rental income from the business property occupied by the lumber company?

A. Yes, sir.

Q. Mr. Whipple, I see here on your interest income schedule in your 1952, and I think also in the 1951 tax return, mention of one D. M. Dozier as having paid you some interest. Who was D. M. Dozier?

A. D. M. Dozier was a field superintendent on a construction job that I made a deal with in 1951. At that time he was outside inspector for Federal Housing Administration, and I made a proposition with him and brought him in on a salary and expenses and a percentage of the profits.

Q. Now, when you say percentage of the profits, was there a specific percentage?

A. Fifteen per cent on the over-all on each project that we had.

Q. Well now, you say over-all project. What do you have reference to, fifteen per cent of the over-all project?

A. Well, he had stock in corporations and an interest in the partnerships and an interest in the land deals; in fact anything with the exception, I believe, of Whipple Lumber Company, which the stock had all been bought. He participated in all of that.

Q. All right, sir.

[fol. 144] Now, you said he had a fifteen percent of the profits. What do you mean, that he had fifteen per cent of the corporation and partnership profits or just what did the fifteen per cent apply to?

A. The fifteen per cent of the profits of each partnership and corporation, because I believe that he was a stockholder for that amount in the corporations that were formed later, as long as he was with us.

Q. Well, let's be specific. Suppose a corporation in which Mr. Dozier had an interest, made a profit for, say, let's say the year 1952. Did Mr. Dozier get fifteen per cent of the corporation profits?

A. No, he didn't get fifteen per cent of the—if he had fifteen per cent of the stock in it. I believe you will find that he had stock in the construction corporations that we had.

Q. Well, did his fifteen per cent interest, my specific question is, apply to all of the enterprises and ventures in which you were engaged or entered after Mr. Dozier came with you?

A. Yes.

Q. They did?

A. Yes, sir.

Q. And did that include corporations and partnerships that—and individual enterprises?

A. He had a fifteen per cent interest in all the joint ventures, partnerships, and individual land deals that I had, I gave him a percentage of the profit, I mean, our deal was that he was to get fifteen per cent of the profits of the deal.

Q. That was kind of across the board arrangement?

A. Yes, sir.

Q. All right, sir.

Now, how long did your association with Mr. Dozier continue?

A. I think Mr. Dozier left in February 1953.

[fol. 145] Q. And at the time Mr. Dozier left, did you have a settlement with him?

A. Yes, sir.

Q. And on what basis did you settle with Mr. Dozier?

A. On the basis of fifteen per cent of the profits and estimated there was profits up to that time, and we tried to estimate profits I believe on what we had under construction at that time. And at that time we had the Westheimer land for sale which we had bought a year earlier or two years earlier, and it had increased in value at that time. And when he left, we paid him an estimated profit on that. This money was paid on February 1953, I believe.

Q. Now, let's see if I understand what you have said.

At the time Mr. Dozier left, sometime in 1953, you paid him fifteen per cent of the profits on the various enterprises?

A. Right.

Q. Joint ventures?

A. Yes, sir.

Q. Partnerships, corporations, your individual deals in which he had an interest, based either on actual profits or on profits which were anticipated from particular ventures then pending?

A. That's right.

Q. All right, sir.

Now, you mentioned the Westheimer land. And on your 1953 tax return you deducted the sum of $3,349.50. And deducted that as an ordinary business expense for payments to Mr. Dozier.

Now, was that the sum that you paid Mr. Dozier in early 1953 settling his interest in the Westheimer land?

A. Sir?

[fol. 146] Mr. Schleider: Would you read the question to him, please ma'am.

(Question read.)

A. If that is the figures in the records, that is what he got.

By Mr. Schleider:

Q. That is the one that we have stipulated that you deducted as an ordinary business expense in your 1953 tax return for payment to Mr. Dozier?

A. Yes, sir.

Q. And my question now is: As to that $3,349.50 that you paid in settlement, that represented what, Mr. Dozier's interest in the properties?

A. Yes, sir.

Q. All right.

Now, was that paid in connection with any work that he did on the Westheimer land or—

A. No, sir. He didn't do any work. It was a piece of land and it had laid out for a year and a half.

Q. On what did you base—

A. On the over-all fifteen per cent of the profits.

Q. Well, at that time, and I refer to the time that you settled with Mr. Dozier, you had not earned any profits from the Westheimer land.

A. That was anticipated profits. The land had gone up in value and that was in the over-all settlement.

Q. Then in effect that would just be a payment in the form of compensation to Mr. Dozier?

A. Yes, sir.

Q. That was a part of his over-all compensation?

A. Yes, sir.

Q. How much did you pay Mr. Dozier in settlement in early 1953, approximately?

[fol. 147] A. Approximately $29,000, I believe.

Q. Now, of course, I take it that there were some credits and offsets.

A. Yes, sir,

Q. Did those sums come from you individually or—

A. Part of them did, I think some several eight or ten checks, different partnerships and corporations paid it.

Q. Now, in 1952 I notice there is attached to your tax return a form 1099, which is labeled Joint Exhibit 13-M,

and it indicates that there was $1,250 paid to you by Federated Department Stores, Inc. of Cincinnati, Ohio. What did the sum represent?

A. Well, that year, that was in connection with the purchase of some land for Mr. Lazarus for Foley's. Mr. Dillingham came to me, and there was a piece of land that joined some property they were going to erect a warehouse on, and they had five days before they were going to start construction. They wanted this property; they wanted to buy it. But with people like that, the price would have probably been much higher than someone else, and I bought the property for them within their budget; and that was the compensation for making the deal for Mr. Lazarus of Foleys.

Q. I am now referring to Joint Exhibit 20-T, which is your 1953 income tax return. In your interest income schedule I notice that you have reported income from interest paid you by Whipple Equipment Company, the Brag Club, Guy Francis and also says: "Guy's Restaurant," and Whipple Lumber Company. Now, what was Guy's Restaurant?

A. Well, Guy Francis is a man to whom I sold Cousin's Restaurant May 31, 1953.

Q. And the Brag Club is the Brag Club that you previously talked about?

A. Over the restaurant.

[fol. 148] Q. And in 1953, you had no interest in that club at that time?

A. No, sir.

Q. Neither 1952 nor 1953?

A. No, sir.

Q. Did you ever own an interest in the Brag Club?

A. No, sir.

Q. Now, I see here in the schedule listing your salaries, Chevy Chase Development Corporation from which you reported a salary. What was Chevy Chase Development Corporation?

A. It was a construction company.

Q. And did you own an interest in that corporation?

A. Yes, sir.

Q. Now, I am again—this line of questioning that I am asking you now pertains to your 1953 income tax return which I previously discussed with you.

I also note in there you also received a salary from Angleton Homes Corporation. Did you own an interest in that corporation?

A. Yes, sir.

Q. And Whipple Equipment Company.

A. Yes, sir.

Q. You owned an interest in that, did you?

A. Yes, sir.

Q. And Whipple Construction Company, Inc., is that correct?

A. Yes, sir.

Q. You owned also or reported a salary from Dozier Whipple Construction Corporation.

A. Yes, sir.

Q. You owned an interest in that?

A. Yes, sir.

Q. You owned that interest in 1952 and 1953?

A. Yes, sir. Now, I—

[fol. 149] Q. I see here listed in your income tax from business partnerships, which is your schedule C, income which you report from A. J. Whipple Construction Company No. 2. Now, what was A. J. Whipple Construction Company No. 2?

A. That was a partnership, construction partnership that was formed after D. M. Dozier came into the picture.

Q. And I also see in that schedule C that you report a loss from Cousin's Restaurant, is that correct? You were operating it part of the time in 1953, Cousin's Restaurant?

A. Yes, sir.

Q. Now, in the schedule of income from other sources, which is Schedule—excuse me—income from rents, you list for the year 1953 building and warehouse Houston, frame house, Houston, commercial building, Lubbock. Are those the same items of property which you were renting and for which you reported income for 1952; is that correct?

A. Yes, sir.

Q. In other words, the building and warehouse would be the lumber yard site?

A. Yes, sir.

Q. And the frame house would be your rent house?

A. Yes, sir.

Q. And the commercial building at Lubbock would be the bottling plant, is that correct?

A. Yes, sir.

Q. Mr. Whipple, in schedule D of your 1953 tax return, which deals with the gain or loss on the sale of capital assets, I see listed here Mason's Rootbeer stock as being sold in 1953, shows an acquisition date of September 1, 1951.

Now, what was Mason's Rootbeer stock?

[fol. 150] A. Mason's Rootbeer was a soft drink bottling venture in Amarillo, Texas.

Q. You say soft drink bottling venture in Amarillo, Texas. Whose venture was it?

A. Mine.

Q. And did you form Mason's Rootbeer?

A. It was a corporation we formed.

Q. Were you an original incorporator and stockholder?

A. Yes, sir.

Q. Who owned th principal stock in Mason's Rootbeer stock?

A. I did.

Q. Do you recall about how much stock you owned in Mason's Rootbeer?

A. If I remember correctly, it was a 10,000 corporation, that is, $10,000 corporation, with $5,000 paid up, of which I owned, I believe, $3,800 out of the $5,000 that was paid in originally.

Q. And tell me a little bit about the kind of business Mason's Rootbeer was engaged in?

A. They were distributors of franchised drinks in Amarillo which we bottled in our plant in Lubbock and hauled by transport to Amarillo.

Q. Was that bottled under the franchises held in the Lubbock plant?

A. No. It was separate franchises for the Amarillo territory.

Q. Did you have the franchise in your name or was it in the name of Mason's Rootbeer?

A. The franchise for Lubbock was in my name as an individual. I am not positive about Amarillo. I just don't recall. But I know they were separate franchises.

Q. Was any bottling done at all in Amarillo, Texas?

A. No, sir.

[fol. 151] Q. That was strictly a distributing company, is that correct?

A. Yes, sir.

Q. And to whom did you sell the Mason's Rootbeer stock, do you recall?

A. It wasn't sold.

Q. The corporation—what happened to the corporation?

A. Sir?

Q. What happened?

A. Mason's Rootbeer?

Q. Yes, sir.

A. It was folded.

Q. Now, you also took a deduction in 1953 for Mission Orange Bottling Company, Inc. of Lubbock, Texas.

A. Yes, sir.

Q. What was Mission Orange Bottling Company, Inc. of Lubbock, Texas?

A. It was a corporation that manufactured and sold franchised soft beverages.

Q. Under what franchise was the manufacturing and selling done?

A. Under Mission Dry Corporation out of California, Delaware Punch Corporation out of San Antonio.

Q. Were those franchises in your name as an individual?

A. They were in the name of A. J. Whipple.

Q. When did you first go into the bottling business at Lubbock, what date?

A. April, 1951.

Q. And did you acquire the bottling plant in Lubbock?

A. I bought it from D. C. Casey of Lubbock.

Q. Had Mission Orange, the corporation, been formed at that time by you?

A. No, sir.

[fol. 152] Q. You bought the plant from Casey in your individual capacity, is that right?

A. Yes, sir.

Q. Did you operate that plant in your individual capacity?

A. I believe for some six months.

Q. Is that right?

A. Yes, sir.

Q. All right.

A. And—

Q. How long after you acquired the bottling plant in Lubbock that Mission Orange, the corporation, was formed?

A. I think approximately six months after we—

Q. I think the record will show, and we have so stipulated, that the corporation was formed on June 8.

A. Well, I don't recall.

Q. And now, you are testifying only from your recollection; is that right?

A. Yes, sir.

Q. There was some period of time in which you operated Mission Orange as a sole proprietorship; is that right?

A. Yes, sir.

Q. You are not distinct about the time involved; am I correct?

A. That's right.

Q. Now, how did you distribute other than through Mason's Rootbeer and the Mission Orange Bottling plant of Lubbock, how did you distribute the soft drinks that were manufactured in Lubbock? Did you use route trucks?

A. Route trucks that serviced the trade.

Q. I suppose that you sold syrup and things of that sort to various restaurants and drug stores?

A. Some, yes.

[fol. 153] Q. How about vending machines, did you have any vending machines?

A. We had a vending machine set up with Ideal, Indiana, where we hold vending machines to the trade.

Q. Well now, did Mission Orange, the corporation, own any interest in the vending machines operation?

A. No, sir.

Q. That was something separate and apart?

A. Yes, sir.

Q. Did you have a local manager on the ground, so to speak, at Lubbock when you first started Mission Orange?

A. Yes, sir.

Q. Who was he?

A. James A. Finley.

Q. And how long did Mr. Finley stay in your employ?

A. From the time of purchase, I believe, August 1953; April 1951 to August 1953.

Q. In other words, if you acquired the Mission Orange franchise and the equipment and bottling plant in your individual capacity in late April, 1951, would Mr. Finley have been operating directly for you at Lubbock while you were operating as a sole proprietor?

A. Yes, sir, he went there when I bought the plant.

Q. In other words, for a time Mr. Finley was directly employed by you?

A. Yes, sir.

Q. And then after Mission Orange Corporation was formed, I take it he was employed by Mission Orange, is that right?

A. Yes, sir, Mr. Finley, yes, sir.

Q. Now—

A. That was—when Mr. Finley first went there, I made Mr. Finley several cash loans. But I don't believe he ever appeared on my permanent books on a salary.

[fol. 154] Q. I see.

Where was Mission Orange doing its bottling when you first acquired the plant in 1951?

A. 2518 Avenue H in Lubbock.

Q. Did they continue at all times to occupy that property?

A. They occupied it until, up until we completed a new plant on the opposite side of the city.

Q. Who built that plant?

A. I did.

Q. You say "I". You mean in your individual capacity?

A. Yes, sir. It belongs to me.

Q. The legal title is vested in you?

A. Yes.

Q. You actually have a deed to the property?

A. Yes, sir.
Q. It's to A. J. Whipple?
A. Yes, sir.
Q. It's not to any corporation?
A. No, sir.
Q. And how about the building, who constructed that?
A. It was constructed for me by a contractor in Lubbock.
Q. But I mean the actual payment of the cost of erecting the structure was borne by you as an individual?
A. Yes, sir.
Q. Not by some corporation?
A. No, sir.
Q. By you as an individual?
A. Yes, sir.
Q. That is the plant you have listed in your 1952 and 1953 tax returns, is that right?
A. Yes, sir.
[fol. 155] Q. That is what you call the commercial building, Lubbock?
A. Yes, sir.
Q. Did you have a lease with Mission Orange on that property?
A. Yes, sir, I did.
Q. Well, I thought I said "did."
A. Well, I thought you said do I.
Q. No.
Mission Orange I take it continued to occupy the premises that you had constructed?
A. Yes, sir.
Q. At all times after it was built, during 1952 and 1953, is that right?
A. Yes, sir.
Q. What prompted you—

Mr. Schleider: Would you mark this as exhibit—
The Clerk: 23 for identification.

(Whereupon the document was marked for identification as Petitioner's Exhibit 23.)

Mr. Schleider: And mark Exhibit 24 for identification.
The Clerk: 24 for identification.

(Whereupon the document was marked for identification as Petitioner's Exhibit 24.)

[fol. 156] By Mr. Schleider:

Q. Mr. Whipple, I have here what has been marked as Petitioner's Exhibits 23 and 24, respectively, which appear to be letters, one dated October 14, 1952, which is Exhibit 24, and one dated June 28, 1953.

Exhibit 24 is a carbon copy, and so is Exhibit 23, and can you tell me who wrote and signed the originals and to whom they were sent?

A. They are letters I wrote to Mr. Finley in Lubbock.

Q. Do you have the original letters?

A. The originals?

Q. Yes.

A. They were sent to Mr. Finley.

Q. Are these copies of those letters?

A. Yes, sir.

Q. And what were they sent to Mr. Finley for?

A. Well, concerning the operation of Mission Orange Bottling Company in Lubbock. And his duties there.

Q. All right, sir.

Did you have any difficulty with Mr. Finley in connection with the managing of those, of the plant?

A. Quite a bit.

Q. What were some of the big problems you had?

A. Finding him when I wanted him. I couldn't keep him on the job.

Q. Did you ever require that he report to you?

A. I tried to, sir.

Q. What kind of report did you require?

A. Sir?

Q. What kind of reports did you require of Mr. Finley?

A. Well, I got a daily report—you mean—I had a daily report from the plant, but as far as Mr. Finley was concerned, I had to go—

Q. I notice—excuse me; I didn't mean to interrupt you.

[fol. 157] A. I had to go to Lubbock quite often and kept in touch with him by telephone.

Q. Now, in these two letters marked respectively as Petitioner's Exhibits 23 and 24, you refer to some reports and daily balance sheets for sales figures and the like.

A. Yes, sir.

Q. And expecting one every 24 hours. Are these reports referred to in Exhibits 23 and 24 the daily reports that you required?

A. Yes, sir.

Mr. Schleider: I am going to offer these.

Mr. Bergeron: No objection.

The Court: It will be received and marked in evidence.

(Whereupon the documents marked Petitioner's Exhibits 23 and 24 for identification were received.)

By Mr. Schleider:

Q. Mr. Whipple, it's the truth, is it not, that part of the problem with Mr. Finley was that he wasn't advising you properly, daily, of the operations of the plant; isn't that correct?

A. That's right.

Q. And why did you require these reports every 24 hours?

A. To try to keep a check on it.

Q. As part of your control of the business?

A. Yes, sir.

Q. Did you make any trips up to Lubbock during the period that you owned Mission Orange? And I am talking [fol. 158] now specifically about the years 1951, 1952 and 1953.

A. I spent a lot of time up there.

Q. Could you give me approximately how much time you did spend up there, or how many trips you made? I know you can't be exact. But approximately how many trips did you make up there during that interval of time?

A. During that two-year period?

Q. Yes, sir.

A. I would say thirty-five or forty.

Q. And did you make long distance telephone calls up there?

A. Numerous, yes, sir.

Q. Did your have frequent telephone conversations with Mr. Finley?

A. Sir?

Q. Did you have frequent telephone conversations with Mr. Finley?

A. Yes, sir.

Q. Now, did Mr. Finley ever come down here to Hous on and talk with you?

A. Yes, sir, several times.

Q. And in addition to the trips you made to Lubbock, Finley would come down here, is that right?

A. Yes, sir.

Q. What would be the purpose of his trips down here and your trips up there?

A. It would be a matter of talking about what was going on up there, discussing the Mission Orange deal.

Q. Who made the managerial decisions as to the policies and prescribed the business practices that would be followed?

A. I tried to.

Q. In so far as Mission Orange was concerned.

A. Yes, sir.

[fol. 159] Q. Now, in 1953 I think you said Mr. Finley—his employment was terminated with Mission Orange.

A. Yes, sir.

Q. That was done at your request?

A. Yes, sir.

Q. Now, did you have a general plant manager after Finley was discharged?

A. I had a plant superintendent.

Q. But I mean—

A. Not an overall manager.

Q. Who did the managing after Finley left?

A. I did at that time.

Q. And did you continue to manage the plant for the remainder of 1953?

A. Yes, sir.

Q. During 1953 and 1952, who owned the Mission Orange franchise?

A. Yes, sir.

Q. I say who owned the Mission Orange franchise?

A. Oh, I did, sir.

Q. And who was the president of Mission Orange?

A. Sir?

Q. Who was the president of Mission Orange?

A. I was.

Q. How long were you the president? Were you president in 1952?

A. Yes, sir.

Q. Were you president in 1953?

A. Yes, sir.

Q. You were the chief executive officer of the company, is that right?

A. Yes, sir.

Q. And you also were the principal stockholder in the company?

A. Yes, sir.

[fol. 160] Q. Does the date December 13, 1953 have any significance to you insofar as Mission Orange is concerned? Well, I think I am at liberty to refer to the stipulation. We have stipulated here about a bill of sale you acquired, whereby you acquired certain personal property of Mission Orange on December 15, 1953.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. What equipment and personal property did you acquire? I know that the bill of sale has a detailed list, but in general, what did you acquire?

A. The equipment that constitutes the bottling plant, with the exception of, I would say there were three pieces of equipment at that time that I believe were mortgaged, of which I didn't take title to. They were mortgaged to Mission Dry Corporation.

Q. But generally, you acquired all of the equipment that was necessary to operate a bottling plant; is that right?

A. Yes, sir.

Q. And from December 15, 1953 on, you owned that equipment?

A. Yes, sir.

The Court: We will take a ten-minute recess.

(Recess.)

By Mr. Schleider:

Q. Mr. Whipple, did you guarantee any loans made to Mission Orange in 1953?

A. Yes, sir.

Q. Do you recall any of those loans that were guaranteed by you?

[fol. 161] A. Well, I guaranteed all the loans at the bank, and I guaranteed accounts with some of the major sources of supply, which would be Delaware Punch, Mission Orange, Anchor Cork and Glass, Liberty Glass, Owens Glass, Brockway Glass.

Q. Now, let me ask you another question here, and that is, did you, during 1953, make a substantial loan or loans to any other corporation other than Mission Orange?

A. I handled some Angelton Building and Holding Company in Angelton.

Q. And that was one of the corporations I believe you had an interest in, is that right?

A. Yes, sir.

Q. Could you tell me approximately how much you loaned to Angelton Building and Holding Corporation in 1953, approximately?

A. I would say some $25,000 or $30,000.

Q. Now then, is it a fair summary that you continued in 1953 to carry on the same type of business and operations that you had done in 1953 and 1951—in 1952 and 1951?

A. Yes, sir.

Mr. Schleider: I have no further questions, Your Honor. Pass the witness.

Cross examination.

By Mr. Bergeron:

Q. Would you say, Mr. Whipple, that your main occupation is building construction?

A. My main occupation? It has been.

Q. Since 1941 when you went with Strickland, that has been your main occupation, has been the development of [fol. 162] property and the building of homes and apartment houses, has it not?

A. I would say I spent the greater part of my time doing it.

Q. Now, you said that there was a Brag Club connected with your Cousin's Restaurant which you could not be—

A. It wasn't connected with the restaurant.

Q. What was the Brag Club?

A. It's a private club up over a restaurant.

Q. Over a restaurant.

And you owned the restaurant?

A. I did own it, yes, sir.

Q. And was that not a drinking club?

A. A drinking club.

Q. In other words, in connection with—well, in Texas, you can't buy drinks by the drink in a restaurant or a bar?

A. That's right.

Q. So the Brag Club complied with the laws of Texas insofar as serving liquor is concerned, is that so?

A. Well, that was a separate—

Q. In other words, you allocated part of your property for the purpose of that club?

A. That was a separate operation entirely. It was two different entities, one for the upstairs and one for the downstairs.

Q. In other words, you had nothing to do with the upstairs?

A. No, sir.

Q. And that Brag Club was there when you bought Cousin's, is that it?

A. No, sir, it wasn't open.

Q. But it was opened as a result of your opening the restaurant?

A. Yes, sir.

[fol. 163] Q. You stated that after you took over the equipment of Mission Orange on December 15, 1953, that it only left a few pieces of equipment in the corporation, is that true, was that the gist of your testimony?

A. Yes, sir.

Q. Do you know what kind of equipment was left?

A. If I am correct, sir, it was a filler and saturater and a mixer.

Q. Is that all the equipment that was left in the corporation, I mean?

A. That's what I think.

Q. You were president of that Mission Orange Bottling Company of Lubbock, Inc., were you not?

A. Yes, sir.

Q. You were president from the date of its organization on June 8, 1951, is that true?

A. Yes, sir.

Q. To refresh your memory, I show you the return of the corporation, Form 1120, for the fiscal year 1954, and ask you if that is your signature at the bottom of the page.

Mr. Schleider: Your Honor, I object to this. Now, this is a 1954 return of Mission Orange—am I correct?

Mr. Bergeron: Fiscal year ended May 1954, which included December 31, 1953, on which date—the date on which the transfer of assets were made and which Mr. Whipple stated he left very few assets to the corporation.

The Court: It doesn't include a part of the present year? [fol. 164] Mr. Schleider: I object to it unless there is some materiality shown, because I see no materialify to this line of questioning here, and particularly in view of the fact he is using a 1954 return.

The Court: But there is no magic in that 1954 business. It's for the month—

Mr. Bergeron: December 31, 1953.

The Court: What is the fiscal year?

Mr. Bergeron: Ending May 31, 1954.

The Court: For the months of May to December, 1953, which is the period we have before us.

Mr. Schleider: I think any reference to that return should be limited in its consideration to that particular period.

The Court: We haven't gotten there yet. All he has asked is: Is it his signature. I will overrule the objection.

By Mr. Bergeron:

Q. Is that your signature?

A. Yes.

Q. This is a schedule marked Schedule L, depreciation schedule, and I will ask you to look it over.

[fol. 165] Does that show the equipment before and after the transfer of equipment to you on or about December 15, 1953?

A. If I am correct, is this the figures that you—

Q. No. These here, these are your assets at the beginning and ending of the fiscal year?

A. Yes, sir.

Q. In other words, what was the figure at the beginning of the fiscal year or on January—on June 1, 1953, what was the total amount?

A. $105,655.85.

Q. And what was the amount as of the end of the fiscal year or May 31, 1954?

Mr. Schleider: I object Your Honor. That has no materiality here.

The Court: Why?

Mr. Bergeron: I want to show the deduction and how much was left. He said there was very little assets left of the equipment after he took the properties on December 15, 1953. I want to show there was over $20,000 of equipment left in the corporation after the transfer to Mr. Whipple.

The Court: In other words, you are not really interested in May; you are interested in January 31. There isn't any way for you to find out.

The Witness: Let me ask you a question.

[fol. 166] Mr. Schleider: Wait just a minute, Mr. Whipple.

Your Honor, again, I renew my objection. It's an attempt to evade our express stipulation that this is a bad debt question, and this has no materiality whatsoever.

The question, it's been stipulated expressly, that the only issue before the Court is business bad debt or not business bad debt.

The Court: Well now, Mr. Bergeron, is there any question here of the credibility of the witness or possibly casting down on the accuracy of his statement?

Mr. Bergeron: That there were very little assets left after he took the remaining.

The Court: You are not producing this for the purpose of qualifying anything that was said—

Mr. Bergeron: No, sir. The stipulation is still a hundred per cent as stated. The evidence is that there were hardly any assets left after he took—

The Court? I think that is a legitimate line of questioning.

Mr. Schleider: Is it offered for impeachment purposes?

The Court: That is my understanding.

[fol. 167] Mr. Schleider: I object there because there is no proper predicate laid for impeachment because the witness testified the books would reflect that, and that would be the best evidence.

The Court: My recollection is the same as Mr. Bergeron, that there was practically nothing left. He said that, regardless of what is in the bill of sale. If the transcript doesn't show that, we have no grounds for impeachment and you aren't hurt.

Mr. Schleider: It's arguendo and—

The Court: It's obviously a statement he made and you have the witness on the stand and you can show it was incorrect.

Mr. Schleider: Is it solely for impeachment purposes?

The Court: That is what I understood.

You may answer.

You want to have the question put again?

Mr. Bergeron: Would you repeat the question.

(Question read.)

A. $22,868.38 represents the end of the fiscal year, and not plant equipment.

[fol. 168] Q. The plant equipment was gone, but you had in this truck and the office equipment, the containers and coolers to the extent of $2,272.25?

A. Yes, sir.

Q. And leasehold, or a total of $22,868.38 as of the end of the year; is that true?

A. Yes, sir.

Q. And that was after you had taken over the $63,000 worth of plant and equipment, is that true?

A. Yes, sir.

Q. And also disposed of $22,000 of the old truck equipment?

A. Yes, sir.

Mr. Schleider: I move to strike the testimony on the grounds that it's not material, Your Honor.

The Court: Well, I will take the motion under advisement, and the way you will know how I have decided it is whether or not it's employed in respect to my final conclusion.

It still is just a question of argument. Mr. Bergeron may argue from the transcript this is inconsistent to what the witness testified before and, therefor, he has tended to impeach his credibility. And whether he can or not will depend on what the transcript shows.

Mr. Bergeron: One more question.

By Mr. Bergeron:

Q. Mr. Whipple, you stated that as to the Angelton Corporation you had made a loan of $25,000 in 1953; is that true?

[fol. 169] A. I said approximately. I didn't—

Q. In other words, that was one of your construction companies too, wasn't it, that Angelton—

A. Yes, sir.

Q. What was the name, Angelton Homes Corporation was the name of it?

A. Angelton Building and Holding Corporation.

Q. And you were one of the owners of the property of, of the corporation?

A. Yes, sir.

Mr. Bergeron: That's all.

Redirect examination.

By Mr. Schleider:

Q. Mr. Whipple, in your testimony on direct examination in response to my question with reference to transfer of certain property by Mission Orange, the corporation, to you in December of 1953, you had reference I believe you said to the bottling equipment.

A. Yes, sir.

Q. That was all you had reference to?

A. Yes, sir.

Mr. Schleider: No further questions.

Mr. Bergeron: I am through with him.

The Court: Well, before this witness leaves the stand—and this is not a question I want to ask the witness; it may really come down to a matter that I will expect you to [fol. 170] deal with in your brief. But primarily, the result of being in a business is the creation of ordinary income? It may be through salaries or it may be through the purchase and sale of property.

When as a result of a business it's the acquisition, properties acquisition in connection with the business, there is a sale, there is normally an ordinary gain and loss and not a capital. I don't imagine there would be anything further you want to ask this witness, but I gathered the impression that when the property was sold to which you referred that he acquired around 1949, 1950, and so on, that it was treated as capital gain, whereas, in the case of a true promoter, he makes his money either by being hired to do the promoting by some syndicate or other, from which he gets a salary and, therefore, the tax is ordinary income; or he makes his money by buying into interests and trying to sell them at a profit, in which case he would do so at ordinary income rates.

I want to give you that phase of the question I am asking you so if there is anything further you want to ask this witness you can develop it.

I am correct, am I not, that this was treated as capital gains?

Mr. Schleider: I would have to check to see that, Your Honor.

The Court: I think you asked the question of the witness, that he had reported the sale of these various properties, I think it was in 1951 interests in partnerships and stock of corporations, and so on, as capital gains.

Mr. Schleider: Those stocks in the 1951 return, as to the capital gain schedule—

[fol. 171] Mr. Bergeron: 12-L.

The Court: Yes, they include such as 29th and Air Line, Inc., and Industrial Homes, Air Line Lumber, a lot of which were—Strickland-Whipple Construction Company, a lot of which were developed, as I understood it, to indicate how many different enterprises this Petitioner had been connected with.

Mr. Schleider: Yes, sir.

The Court: And they were, when they were disposed of, they were all treated as capital gain, as I understand.

Mr. Schleider: That's correct.

The Court: So I want to give you that thought—

Mr. Schleider: Would the Court indulge us in just a brief conference here with co-counsel?

The Court: Yes.

Mr. Schleider: If it please the Court, I believe we have nothing further to add on that score.

[fol. 172] The Court: Very well.

Mr. Dillingham: We appreciate that though, Your Honor.

The Court: Anything for the Respondent?

Mr. Bergeron: We are through.

The Court: What about briefs?

Mr. Schleider: If it please the Court, we would like ninety days on our brief, original brief, plus thirty days for the replies.

Mr. Bergeron: That throws us into the summer vacation. Let's take sixty days. I don't want to write a brief in July. It's too hot.

The Court: Of course, there is nothing to stop you from getting your first brief in within the sixty days.

Mr. Bergeron: But I will be worried. I won't know what he is going to say in his if he has thirty days more.

The Court: Let's see how it works out. I would rather take the time now than for you to come in for an extension, which happens all the time.

[fol. 173] Mr. Bergeron: I never ask for an extension. You know it.

The Court: The ninety days would be when, Mr. Clerk?

The Clerk: July 22.

The Court: And sixty days would be when?

The Clerk: Sixty days would be June 22.

The Court: And then if it were ninety days—and what did you ask for, thirty days for reply?

Mr. Bergeron: Yes, sir.

But I wasn't trying to speak for him. He is the principal for that.

The Court: If it were forty five days for reply, that would give you time to go into the fall for the reply brief. Would that be satisfactory?

Mr. Bergeron: O.K.

The Court: All right.

[fol. 174] Ninety days for the main brief and forty five days for the reply.

The Clerk: July 22 for the original brief—July 21 for the original brief and September 4, 1959, for replies.

Mr. Schleider: July 21, 1959 for—

The Clerk: Original briefs.

And September 4, 1959, for the reply briefs.

The Clerk: Anything further?

Mr. Bergeron: No, nothing further, Your Honor.

Mr. Schleider: Nothing further.

The Court: Mark submitted.

Mr. Schleider: I said nothing further. I believe under the stipulation yesterday it was allowed by the Court that I could reproduce this, send Mr. Bergeron a copy and send the original withdrawn to the clerk.

The Court: Whatever exhibits you want to take out.

[fol. 175] Mr. Schleider: I don't need to file a written motion on that, do I?

The Court: No, but leave a receipt with the clerk.

Can you do that in the back of the room so we can go ahead with the next case.

Mr. Schleider: All right, sir.

(Whereupon, at 11:50 o'clock, a.m., the hearing in the above-entitled matter was concluded.)

BEFORE THE TAX COURT OF THE UNITED STATES

MOTION FOR TRANSMISSION OF TESTIMONY, STIPULATION OF FACTS AND ORIGINAL EXHIBITS—Filed October 7, 1960, and order thereon.

COME Now the parties to the above-entitled proceeding by their counsel of record, and move:

1. That the original official report of proceedings before the Tax Court of the United States at its hearing in Galveston, Texas, on April 21, and 22, 1959, pages 1-32, and the original stipulation of facts, together with the originals of Exhibits 1-A through 20-T attached thereto, and the originals of Petitioners' Exhibits 21, 22, 23 and 24, filed on April 21, and 22, 1959, in lieu of a narrative statement of the evidence, be made a part of the transcript of record in this cause to be filed with this Court, all of said original [fol. 176] documents to be returned to the Tax Court when they have served the purpose of this Court.

2. That the originals of Exhibits 1-A through 20-T attached to the stipulation of facts and the originals of Petitioners' Exhibits 21, 22, 23 and 24, shall remain in the custody of the Tax Court until ten days prior to the hearing before this Court, and upon direction of counsel, to be then transmitted by the Clerk of the Tax Court to this Court.

3. That said Exhibits 1-A through 20-T attached to the stipulation of facts, and Petitioners' Exhibits 21, 22, 23 and 24, need not be printed in the record on review herein but may be referred to by counsel in their respective briefs and on oral argument, or reproduced, in whole or in part, in an appendix to their respective briefs, and considered by the Court with same force and effect as if included in the printed record on review.

4. That the Clerk of this Court transmit a certified copy of this Order to the Clerk of the Tax Court of the United States to be by him incorporated in the transcript of record on review herein.

Charles Dillingham, Counsel for Petitioners on Review, 802 Texas National Bank Bldg., Houston 2, Texas.

Charles K. Rice, CRM, Assistant Attorney General.

[fol. 177] Hart H. Spiegel, CRM, Chief Counsel, Internal Revenue Service, Counsel for Respondent on Review.

So Ordered: Richard T. Rives, U. S. Circuit Judge.

BEFORE THE TAX COURT OF THE UNITED STATES

PRAECIPE FOR RECORD—Filed February 17, 1961

To the Clerk of the Tax Court of the United States:

You will please transmit and deliver to the Clerk of the United States Court of Appeals for the Fifth Circuit, copies, duly certified as correct, and originals where so designated, of the following documents and in the above-entitled cause, in connection with the petition for review by the said Court of Appeals for the Fifth Circuit, heretofore filed by the above-named petitioner.

1. Docket entries of the proceedings before the Tax Court of the United States.

2. Pleadings before that Court.

3. Findings of fact, opinion and decision of that Court.

4. Petition for review and assignments of error.

[fol. 178] 5. Original of the full official report of proceedings before the Tax Court of the United States at its hearings in Galveston, Texas, on April 21 and 22, 1959, pages 1-132.

6. The original Stipulation of Facts.

7. Originals of Exhibits 1-A through 20-T attached to the Stipulation of Facts.

8. Originals of Petitioner's Exhibits 21, 22, 23 and 24 filed with the Tax Court on April 21 and 22, 1959.

9. This praecipe.

10. Motion for transmission of testimony, stipulation of facts and original exhibits.

11. Order for transmission of testimony, stipulation of facts and original exhibits.

12. Notice of filing petition for review.

13. Orders enlarging time for transmission and delivery of record.

Charles Dillingham, Ben H. Schleider, Jr., Attorneys for Petitioners on Review.

Charles Dillingham, Ben H. Schleider, Jr., 802 Texas National Bank Bldg., Houston 2, Texas.

[fol. 179] Certificate of service (omitted in printing).

[fol. 180] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 181]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18963

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
November 8, 1961

[Title omitted]

On this day this cause was called, and after argument by Charles Dillingham, Esquire, for appellants, and William A. Friedlander, Esquire, Attorney, United States Department of Justice, was submitted to the Court.

[fol. 182]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18963

A. J. WHIPPLE and MILDRED WHIPPLE, Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition for Review of Decision of the Tax Court of the United States.

OPINION—April 4, 1962

Before Tuttle, Chief Judge, Hutcheson and Rives, Circuit Judges.

Tuttle, Chief Judge: The taxpayer-petitioners here complain of the decision of the Tax Court which held that the taxpayers' advances to the corporation, in which the husband held a majority interest, represented, within the meaning of Section 23 (k) of the 1939 Internal Revenue Code, a non-business rather than a business bad debt, when these advances became worthless upon the insolvency of the corporation. So far as is significant here a non-business bad [fol. 183] debt is defined in the statute as one "other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business." The debt which the petitioner claims he should be allowed to deduct as a business bad debt represents the balance of unpaid advances which Whipple had made to Mission Orange Bottling Company, a soft drink bottling company, in which he owned approximately 80% of the stock and of which, at the time of the debt becoming worthless, he had assumed the active man-

agement because of its unsuccessful operation thus far. The final advance of $48,000 was made by taxpayer to Mission Orange coincidentally with its transfer to him of its entire physical assets on December 15, 1953. This left his unrecovered claim against Mission Orange at $56,975.10. It is conceded that this amount became worthless during the month of December, 1953.

The Tax Court, based on ample evidence, found that during the period of four years commencing in 1949, petitioner was instrumental in incorporating fifteen corporations, fourteen of these were engaged in construction, building or real estate business; petitioner owned an interest in five additional construction or real estate corporations, and at one time or another was a member of ten partnerships involved in similar activities; during this period of time the petitioner spent the major part of his time and energies in the construction of real estate business, or the related building supply business; on April 25, 1951, petitioner obtained a franchise from the Mission Dry Corporation entitling him to produce, bottle, distribute and sell Mission Beverages in certain counties in Texas; during the same month he purchased the bottling machinery and equipment then owned by one D. C. Casey, who was operating the Mission Orange [fol. 184] Company in Lubbock, Texas; he conducted this business as a sole proprietorship until approximately July 1, 1951, at which time he organized debtor corporation, Mission Orange Bottling Company, and transferred the bottling machinery and equipment to it; the bottling business was apparently not successful, for during the years 1952 and 1953, he made advances to it so that including the amount which the corporation owed him as the result of his sale of the bottling assets, it was indebted to him in the sum of $79,489.06, on December 1, 1953. On December 15th petitioner advanced Mission Orange $48,000 to pay general creditors, and on the same date he received a transfer from Mission Orange of bottling machinery, equipment and an automobile, which had the value of $70,414.66. This left a net amount due by Mission Orange to him of $56,975.10, which the Tax Court found became worthless during the month of December, 1953.

The Tax Court, in its opinion, stated:

> "If we were required to find a definite time of worthlessness we should be inclined to say December 15, 1953, at which time petitioner received the bottling machinery from Mission Orange in partial satisfaction of that corporation's obligation."

Thus it appears that at the time when the sum of $48,000 of the indebtedness in issue was advanced to Mission Orange petitioner had no hope of its being recovered.

Petitioner recognizes the usual rule that where the controlling stockholder of a corporation is unable to obtain [fol. 185] repayment of moneys he advances to his corporation to bolster up its operating possibilities this is generally considered a non-business bad debt. This follows because in such a case the loan or advance made by the taxpayer to the corporation is no part of any business which he is engaged in individually. It is an advance or loan made by him to enable his wholly owned corporation to make a profit. The petitioner here, however, contends that his extensive activity in the formation of the numerous corporations and the extensive activity he himself performed in attempting to save the Mission Orange Company in its operation, made these particular advances loans in some separate trade or business carried on by the taxpayer.

The Tax Court made the following findings of fact:

> "Petitioner was not in the business of organizing, promoting, managing or financing corporations in 1953. He was not in the business of lending money in that year."

In its opinion the Tax Court also determined that taxpayer was not personally in the business of bottling and selling soft drinks at the time he made the advances that resulted in the debt here in issue.

In the case of *Giblin* v. *Commissioner*, 5 Cir. 227 F. 2d 692, this Court said:

> "We recognize the fact that the question whether the activities of a taxpayer constitute carrying on a trade or business is largely one of fact, the solution of which 'requires an examination of the facts in each case.'

[fol. 186] Higgins v. Commissioner of Internal Revenue, 312 U. S. 212, 217, 61 S. Ct. 475, 478, 85 L. Ed. 783. The findings of the Tax Court or the District Court, therefore, are normally critical on this issue."

The Giblin case is one in which this Court found that under the peculiar circumstances which were there present a taxpayer could treat a loss, resulting from the failure of his wholly or partially owned corporations to repay advances, as a business bad debt. In articulating the circumstances which justified a finding of the existence of a business bad debt, we said:

"Taxpayer did not seek to show that he was engaged in the business of making loans. Neither did he seek to have the Tax Court 'pierce the corporate veil' and find that he was engaged in the restaurant business or in any of the other businesses which he had promoted and dealt with during the preceding twenty years. What he did seek to prove was that he was regularly engaged in the business of seeking out business opportunities, promoting, organizing and financing them, contributing to them substantially 50% of his time and energy and then disposing of them either at a profit or loss . . . "

We further stated:

"Petitioner's right to deduct the amount of the cancelled debt depends not upon his showing, as the Tax Court seemed to think, that he was in the business of lending [fol. 187] money, but rather that he was regularly engaged in the business of 'dealing in enterprises,' during the course of which he operated either as a proprietor, as a stockholder, as a partner or as a lender or in a combination of these capacities, contributing to each enterprise his own initiative and energy, and such financial backing as required."

We think that the Tax Court was amply warranted in finding that there was no evidence in this record, other than the simple fact that taxpayer had used his talents as a

building contractor to organize a large number of companies to conduct such building operations, that he was interested in any way in doing any more than enabling these separate corporations to achieve a successful and lucrative operation as corporations. Taxpayer's claim, it seems clear to us, falls within the class of those who fail to recognize the distinction between carrying on one's business through a corporate form, which of course, requires some organizing and financing, and the business of dealing in corporations, which may likewise require some financing arrangements. As stated by the Court of Appeals for the Ninth Circuit in *Holz* v. *Commissioner of Internal Revenue*, 256 F. 2d 865, at page 870:

> "Where the former is the situation, it is hornbook law, and not contested by petitioner, that the corporate entity is the primary debtor and stockholder loans to protect his investment or increase its value do not create a separate business for the stockholders. As the Fifth Circuit recently said in distinguishing the Giblin case, supra, 'Petitioner was not engaged in the [fol. 188] business of dealing in enterprises.' Pokress v. C.I.R., 1956, 234 F. 2d 146, 150 note 12. Nor did the Tax Court, nor do we, find him so engaged here. The finding of the Tax Court is binding upon us unless clearly erroneous. Here, it is not."

This opinion then cited the case of *Burnet* v. *Clark*, 287 U. S. 410, where at page 415 the Supreme Court said:

> "[The taxpayer] was not regularly engaged in indorsing notes, or buying and selling corporate securities. The unfortunate indorsements were not part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares."

The case of *Ferguson* v. *Commissioner*, 4 Cir. 253 F. 2d 403, is equally persuasive of the correctness of the Tax Court's decision here. In that case it was said, "It is now well settled that debts such as these are not deductible as business bad debts unless the taxpayer is so extensively

engaged in the business of promoting or financing business ventures as to elevate that activity to the status of a separate business." 253 F. 2d 403, 406.

So far as relates to the petitioner's contention that he was engaged in the separate business of lending money, we think that the Tax Court's finding that the relatively small number of interest bearing loans made by the taxpayer did not constitute a separate business engaged in by him. Furthermore, we think it was certainly within the ability of the Tax Court to find as a fact that the particular [fol. 189] advances made to the Mission Orange Company, especially the $48,000 advanced on the date on which it stripped itself of all of its physical assets, were not made in the course of a separate business conducted by the taxpayer. We certainly cannot find that this determination by the Tax Court was clearly erroneous.

The decision of the Tax Court is Affirmed.

HUTCHESON, Circuit Judge, Dissenting:

The sole question for decision in this case is whether the $56,975.10 debt of Mission Orange Bottling Company of Lubbock, Inc., to petitioner, A. J. Whipple, was a business bad debt or a non-business bad debt within the meaning of Sec. 23 (k) (1) or Section 23 (k) (4), respectively, Internal Revenue Code of 1939. I am unable to agree with the opinion of the majority, and, for the reasons hereinafter stated, I dissent.

It was stipulated: (1) that it was a debt; and (2) that it became worthless in 1953.

The answer to the question turns on whether or not the loss resulting from the debt's becoming worthless did or did not bear a proximate relationship to the conduct of a business in which petitioner Whipple was engaged at the time the debt became worthless.

The taxpayer is here insisting that the tax court below and the government in its brief and on oral argument have [fol. 190] failed to recognize and give effect to the fact that, though taxpayer's activities which gave the debt rise might not lend themselves to a specific name or label, they were certainly of a business nature within the meaning and

intent of the act, in that the petitioner engaged in them for the purpose of deriving income therefrom, and the bad debt loss suffered had a direct relationship to the conduct of these business activities.

I agree with these views. While the act is loosely drawn and has the fault of a negative approach to definition, that is, seems to be more concerned with stating what is not, than with what is, a business debt, we think that the language of the statute and regulation involved[1] and its legislative

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[1] *Internal Revenue Code of 1939:*

"Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

* * * *

[As amended by Sec. 1346 (a) Rev. Act. of 1942 c. 619 56 Stat. 798] (k) Bad Debts. —

"(1) General rule. — Debts which become worthless within the taxable year; * * *. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection. * * *"

* * * *

"(4) Non-business debts. — In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt, the worthlessness of which is incurred in the taxpayer's trade or business."

* * * *

(26 U. S. C. 1952 ed. Sec. 23)

"Treasury Regulations 118 (1939 Code):

"Sec. 39.23 (k) — 6. Non-business bad debts. (a) * * *

"(b) The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a nonbusiness debt for the purposes of this section."

[fol. 191] history[2] shows that the intent was not to deny a business bad debt deduction under the facts presented in this case.

I think, too, that the tax court, the Commissioner, and the majority opinion of this court have erred when, instead of relying on the language and legislative history of the act, they have placed their reliance on the gloss which has been put on the statute by various and sundry decisions cited by them which have construed this remedial statute so narrowly as practically to defeat its remedial purpose.

The language of the act and its legislative history both show that congress, desiring to encourage risk taking with [fol. 192] respect to loans incurred in connection with business and to discourage the making of loans for use taxwise to kinsmen or friends, gave favorable tax treatment to bad debts arising out of, or in connection with business ventures, while denying such treatment to purely personal bad debts or those where other than business considerations motivated the lending. I think that the purpose of the statute was, and

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[2] As the House of Representatives Report No. 2333, 77th Congress, First Session, states in regard to the Revenue Act of 1942, at page 409 of Cumulative Bulletin 1942-2:

> "The present law gives the same tax treatment to bad debts incurred in non-business transactions as it allows to business bad debts. An example *of a non-business bad debt would be an unrepaid loan to a friend or relative, while business bad debts arise in the course of the taxpayer's trade or business.* This liberal allowance for non-business bad debts has suffered considerable abuse through taxpayers making loans which they do not expect to be repaid. This practice is particularly prevalent in the case of loans to persons with respect to whom the taxpayer is not entitled to a credit for dependents. The situation has presented serious administrative difficulties because of the requirement of proof." (emphasis added)

The Senate Committee Reports contain no further explanation of the purpose for the insertion of the subsection which became 23 (k) (4).

The relationship which the loan must have to a taxpayer's business was explained in the House Committee Report on page 431 of C.B. 1942-2 where it quoted from Treasury Regulation 118, as shown in note 1, above, and then went on to give illustrations of debts which were incurred in what was obviously a business transaction to show how the time of the debt's becoming worthless would control in determining its proximate relationship to the taxpayer's business.

is, not advanced and the remedy is completely defeated when the mischief the statute was designated to meet is dropped entirely out of consideration, as in the board's decision here, in some of the decisions the board relies on, and in the majority opinion.

In the beginning of the interpretation of the statute and its application, the decisions were not so at fault. In the very first year of the applicability of Sec. 23 (k) (4), 1943, the question of how proximate the relationship of the debt to a business of the taxpayer must be was raised and decided in the case of Robert Cluett, 3rd, et ux v. Commissioner, 8 T. C. 1178 (1947). In that case the taxpayer sold a one-fourth ownership in a stock exchange seat for $125,000 and took a note from the purchaser for $65,000. The purchaser subsequently went bankrupt, leaving $28,985.97 owing on the note. The taxpayer deducted this sum as a business bad debt and the court allowed it as such.[3]

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[3] In allowing this as a business bad debt, the court said:

"The principal contention of the respondent seems to be that the loss from the bad debt in question did not arise in the ordinary course of the operation of a business involving the buying and selling of stock exchange seats. The petitioner does not contend that he was regularly engaged in any such business. Neither does he contend that the loss in question was one sustained in a usual transaction of any partnership of which he was a member. He contends, however, that the loss resulted directly from the operation of the business in which he was regularly engaged, both at the time the sale was made and at the time the debt became worthless, and, in the alternative, that the loss was at least proximately related to or connected with the business. * * *"

"*The legislative history of Sec. 23 (k) (4) indicated that its principal purpose was to place a limitation upon losses from bad debts, such as loans to relatives or friends which had no connection with the business* of the lender. * * * (Emphasis supplied)

"The debt here in question was not the result of a loan by the petitioner to a friend or relative or an isolated transaction which bore no relation whatsoever to the business in which he was engaged, but, on the contrary, was closely related to the business of owning and using a stock exchange membership for the production of income, in which business the petitioner was engaged not only in 1929, when the debt was created, but also in 1943, when it became worthless. * * *"

[fol. 193] It is significant to note, that the Treasury Department acquiesced in this interpretation of the statute, 1942-2 CB (2).

The next case to pass on the meaning of Sec. 23 (k) (4), was that of *Campbell* v. *Commissioner*, 11 T. C. 510 (1948), involving the taxable year 1944. The three petitioners in the Campbell case had been engaged since 1929 in organizing, owning and operating corporations (in total 12) engaged in the retail coal business. It was their practice as a part of their business to advance to (or leave with) those corporations on open account money belonging to them in many different instances. One of those corporations was the Campbell Bros. Coal Co. of Akron. The loans to that company which were in question were similar to loans made to others of their companies. The court, in determining that the loss resulting from such worthlessness was a business bad debt, denied the government's claim that taxpayer's loss fell under Section 23 (k) (4).[4]

[fol. 194] The commissioner also acquiesced in this case, decided in 1948, 1949-1 CB (1).

The Treasury's acquiescence in the Cluett and Campbell cases has never been withdrawn, and they still stand as the basic interpretative decisions on the statute.

The taxpayer in the Cluett case was certainly not in the business of selling stock exchange seats, and Mr. Campbell was not in the business of selling coal companies. Yet the government contends, and the tax court and the majority

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[4] The court said: "* * * They were debts, the loss from the worthlessness of which was incurred in the taxpayer's business. A finding has been made that they were business rather than non-business bad debts, because the evidence shows that they had a direct connection with the business carried on by these petitioners, and the losses were directly the result of, and incurred in, the business of *organizing and operating corporations engaged in the retail coal business, which business of organizing and operating such corporations was carried on by the petitioners during the taxable year. These are not cases in which losses of corporations are being confused with losses of individuals or in which the business of a corporation is being confused with the business of individuals.* Nor are they like net loss carry-over cases in which the loss occurred in isolated transactions rather than in the operation of a business. * * *" (Emphasis added)

have erroneously held, that in order for the loss to be deductible, taxpayer Whipple must show that the numerous corporate enterprises which he promoted, financed, and managed were formed by him for sale. This extension of the restriction on the qualification of business bad debts contended for by commissioner and tax court considerably restricts the remedy which congress provided for curing the mischief it had in mind. I think it clear that such restriction was never contemplated by Congress. Indeed the contention pressed here emasculates a clearly intended remedial law.

Looking at the question in the light of the language of the act and its legislative history, I am in no doubt that the [fol. 195] tax court was wrong in citing and relying on cases to the contrary of these views for such a restrictive and defeating construction.

I am also of the opinion that the great weight and number of the decided cases[5] and the strength of their reasoning support petitioner's view. The case of *Giblin* v. *Commissioner*, note 5, supra, decided by this court, carefully and correctly construed and applied the statute and gave it a construction and application which the petitioner contends for and is entitled to here.

It seems to me that the basic fault of the majority opinion is in holding, as it in effect does, that business bad debt treatment must be denied the taxpayer here because the loan was to a corporation in which he was interested. This holding is, in my opinion, a clear addition to the taxing statute. If congress had so intended, it could and would have so provided. Not having done so, neither the tax court nor this court can construe the statute as though it contained such provision.

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[5] Giblin v. Commissioner, 227 F (2) 692; Maytag v. U. S., 289 F (2) 647; Trent v. Commissioner, 291 F (2) 669; Maloney v. Spencer, 172 F (2) 638; Sage v. Commissioner, 15 T. C. 299; Foss v. Commissioner, 75 F (2) 326; Commissioner v. Stokes Estate, 200 F (2) 637; Scott v. Commissioner, 14 TCM 1029.

[fol. 196]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18963

A. J. WHIPPLE and MILDRED WHIPPLE

versus

COMMISSIONER OF INTERNAL REVENUE.

JUDGMENT—April 4, 1962

This cause came on to be heard on the petition of A. J. Whipple and Mildred Whipple for review of a decision of the Tax Courts of the United States, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, affirmed.

"Hutcheson, Circuit Judge, Dissenting."

[fol. 197]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,963

[Title omitted]

PETITION FOR REHEARING—Filed April 24, 1962

The Petitioners, A. J. Whipple and Mildred Whipple, respectfully petition this Honorable Court for a rehearing of the appeal in the above entitled cause, and in support of this petition represent to the Court as follows:

1. The majority of the Court in the Court of Appeals for the Fifth Circuit, erred as did the Tax Court when it

failed to make any finding as to Petitioner's contention, on which ample evidence was introduced, that he was in the business of acquiring, owning, expanding, equipping and leasing bottling plants, a proximate result of the conduct of which business the $56,975.00 bad debt loss resulted in 1953, within the rule of *Maloney* v. *Spencer* (9th Cir.) 172 Fed. 2d 638.

[fol. 198] 2. The majority of the Court in the Court of Appeals for the Fifth Circuit perpetuated the error of the Tax Court by failing to make any finding as to whether a combination of Petitioner's activities, which resulted in the generation of $95,950.14 of ordinary income in the years 1951-53, constituted a business in which the Petitioner sustained the $56,975.10 bad debt loss in 1953. The Court segregated Petitioner's activities into specific lines of endeavor, considered them separately, and concluded that Petitioner was not in that particular business, thereby overlooking his contention that his operations as a proprietor, as a stockholder, as a partner or as a lender *or in a combination of these capacities*, contributing to each enterprise his own initiative and energy, and such financial backing as it required, constituted a business distinct in itself.

3. The majority of the Court in the Court of Appeals for the Fifth Circuit erred as a matter of law in holding, in effect, that in order for a taxpayer to receive the benefits of business bad debt relief he must show that he was in the business of dealing in enterprises and forming corporations for sale. The majority of the Court erroneously placed this interpretation on the case of *Giblin* v. *Commissioner* (5th Cir.) 227 Fed. 2d 692, because the record in that case shows that Giblin did not meet such a requirement.

4. The majority of the Court in the Court of Appeals for the Fifth Circuit erred in failing to consider the criteria established by the legislative history of Sections 23(k)(1) and 23(k)(4) of the *Internal Revenue Act* of 1939 in that such history indicates that the statute was intended to have a strict remedial application and not to disallow

the full deduction to individuals engaged in activities such as Petitioner.

[fol. 199] 5. The majority of the Court in the Court of Appeals for the Fifth Circuit erred as a matter of law in holding, in effect, that business bad debt treatment should be denied Petitioner, A. J. Whipple, because the loans in question were made to a corporation in which he was interested.

6. The majority of the Court in the Court of Appeals for the Fifth Circuit erred in failing to recognize that the activities of Petitioner, A. J. Whipple, were more extensive than were those of the taxpayer in *Giblin* v. *Commissioner* (5th Cir.) 227 Fed. 2d 692, in the creation of ordinary income, as a proximate result of which activities he suffered a bad debt loss.

7. That part of the holding of the majority of the Court in the Court of Appeals for the Fifth Circuit in which reference is made to the Tax Court's comments on the date of the debt becoming worthless and the finding "thus it appears that at the time the sum of $48,000.00 of the indebtedness in issue was advanced to Mission Orange petitioner had no hope of its being recovered" was clearly erroneous because it goes behind the stipulations made by the parties in the Tax Court. It was stipulated before the Tax Court: "8. That as of December 31, 1953, Mission Orange Bottling Co. of Lubbock, Inc., was indebted to petitioner, A. J. Whipple, in the amount of $56,975.10, and that such debt had become worthless in 1953, and the sole issue remaining as to said sum of $56,975.10 is whether said sum is a business bad debt or a non-business bad debt within the meaning of Section 23(k)(1) or Section 23(k)(4), respectively, *Internal Revenue Code* of 1939." Petitioner, therefore, introduced no evidence, nor was it necessary to determine the exact date of the debt's becoming worthless.

[fol. 200] For the foregoing reasons this Petition should be granted.

Charles Dillingham, Ben H. Schleider, Jr., Attorneys for Petitioners.

Charles Dillingham, Ben H. Schleider, Jr., 802 Texas National Bank Building, Houston 2, Texas.

THE STATE OF TEXAS)
COUNTY OF HARRIS)

CHARLES DILLINGHAM, being duly sworn, on oath certifies and says:

That he is one of the attorneys for Petitioners in this cause; that he makes this certificate in compliance with Rule 29 of the Rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and is presented in good faith and not for delay.

Charles Dillingham.

Sworn to and Subscribed before me this the 23 day of April, 1962.

Ida R. Horn, Notary Public in and for Harris County, Texas.

Certificate of service (omitted in printing).

[fol. 201] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,963

[Title omitted]

Petition for Review of Decision of the Tax Court of the United States

ORDER DENYING PETITION FOR REHEARING—May 11, 1962

Before Tuttle, Chief Judge, Hutcheson and Rives, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

Hutcheson, Circuit Judge: "I Dissent."

[fol. 202] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18,963

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed May 18, 1962

A. J. Whipple and Mildred Whipple, Petitioners, move the Court to enter an Order staying the issuance of the mandate in the above-entitled case because it is the bona fide intention of the Petitioners to make proper application to the Supreme Court of the United States for a Writ of Certiorari in this case, within the next ninety days, and in support hereof Petitioners incorporate the certificate

[fol. 203] of their counsel, Charles Dillingham of Houston, Texas.

I hereby certify that it is the bona fide intention of the Petitioners to make application to the Supreme Court of the United States for a Writ of Certiorari within the next ninety days, and that I believe there is merit in Petitioners' case and that the decision of the United States Court of Appeals for the Fifth Circuit ought to be reversed by the Supreme Court of the United States.

Petitioners would further show that there is presently on file in the Tax Court of the United States where this case originated under Docket No. 65603 in that Court, a bond in the amount of $28,000 signed by Petitioners, as principals, and St. Paul Fire and Marine Insurance Company, St. Paul, Minnesota, as surety, conditioned on the prosecution of the petition for review of Petitioners and payment of the deficiency as finally determined together with any interest, additional amounts or additions to the tax provided for law, the amount of said bond having been fixed by the Judge who heard the case in the Court below, and Petitioners would move that such security be approved by this Court as sufficient for the stay.

Wherefore, Petitioners pray that the Court Order that [fol. 204] the issuance of mandate in the above-entitled case be stayed for a reasonable time to enable the Petitioners to obtain a Writ of Certiorari from the Supreme Court of the United States, and Petitioners further pray that the Court approve the bond now on file in the Tax Court for this stay.

Respectfully submitted,

Charles Dillingham, Counsel for Petitioners, 802 Texas National Bank Building, Houston 2, Texas.

Certificate of service (omitted in printing).

[fol. 205] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18963

[Title omitted]

ORDER STAYING MANDATE—May 28, 1962

On Consideration of the Application of the petitioners in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable petitioners to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days from May 11, 1962; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from May 11, 1962 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from May 11, 1962, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

Elbert P. Tuttle, Chief Judge.

[fol. 206] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 207]

SUPREME COURT OF THE UNITED STATES

No. 305—October Term, 1962

A. J. WHIPPLE, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE

ORDER ALLOWING CERTIORARI—October 22, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.